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## Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention

### Cover Page Footnote

J.D. Candidate, 2010, Fordham University School of Law; B.S., 2007, Georgetown University. I would like to thank Professor Thomas Lee for his invaluable guidance and feedback throughout this process, my friends for their constant support, and my parents and Hansel for their love and encouragement.

# **BACK TO BASICS: DETERMINING A CHILD'S HABITUAL RESIDENCE IN INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION**

*Tai Vivatvaraphol\**

*Since 1980, the Hague Convention on the Civil Aspects of International Child Abduction (Child Abduction Convention) has been ratified by eighty-one countries, including the United States. The Child Abduction Convention addresses the growing problem of child abductions by estranged parents across international borders and the diverse methods that different countries have developed for dealing with this problem. It provides for a simple summary-return mechanism to be administered by the courts of member states: a wrongfully removed (or retained) child is to be returned to (or permitted to stay in) his or her country of "habitual residence." However, the Child Abduction Convention does not define the term "habitual residence," and so courts worldwide have been forced to shape their own standards. In the United States, a rough divide stands between those federal circuit courts that emphasize the parents' last shared subjective intentions in determining "habitual residence" and those that focus on objective indicators of a child's acclimatization. This Note argues in favor of an objective approach because it best accomplishes the Child Abduction Convention's aim of instituting a globally uniform and efficient process for resolving international child abduction disputes.*

## **INTRODUCTION**

On June 2, 2007, Janea Sorenson made what would likely be one of the most important decisions of her life—rather than return to the United States with her estranged husband, Eric, Janea decided to remain in Australia with their five-year-old daughter, E. S. S.<sup>1</sup> Although Janea's decision that day brought *Sorenson v. Sorenson*<sup>2</sup> before the U.S. District Court for the District of Minnesota for proceedings under the Hague Convention on the

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1. *Sorenson v. Sorenson*, 563 F. Supp. 2d 961, 964 (D. Minn. 2008).

2. 563 F. Supp. 2d 961.

Civil Aspects of International Child Abduction (Child Abduction Convention),<sup>3</sup> the events leading up to Janea's alleged wrongful retention of E. S. S. actually began four years earlier.

In November 2003, Eric accepted a new job that required him to be reassigned to Australia.<sup>4</sup> The Sorensons sold their house and cars in Minnesota, packed up their remaining belongings to be shipped or stored with family, and, in February 2004, landed in Sydney with their daughter E. S. S., who was then fourteen months old.<sup>5</sup> Eric and Janea's already strained marriage deteriorated further upon their move to Australia and they separated in March 2005.<sup>6</sup> By May 2007, with the expiration of their three-year visas looming, Eric and Janea exchanged emails about flights back to the United States.<sup>7</sup> However, after Eric served Janea with a copy of a petition for the dissolution of their marriage he had filed in Minnesota state court, she announced that she would be staying in Australia and began working to obtain new visas for herself and E. S. S.<sup>8</sup>

When the family's visas expired on June 2, 2007, Janea retained E. S. S. in Australia against Eric's wishes.<sup>9</sup> Eric delayed his departure from Australia and attempted to convince Janea to reconsider; when that failed, he returned to the United States without E. S. S.<sup>10</sup> Eric then submitted an Application for Return of Child under the Child Abduction Convention to the U.S. Central Authority.<sup>11</sup> When the Australian Central Authority sought a Judicial Determination of Habitual Residence, Eric filed the petition in a Minnesota federal district court.<sup>12</sup> Eric argued that the family

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3. Hague Convention on the Civil Aspects of International Child Abduction pmbl., Oct. 25, 1980, T.I.A.S. No. 11,670 [hereinafter Child Abduction Convention]; *Sorenson*, 563 F. Supp. 2d at 968 (noting that it was not until the family's visas expired on June 2, 2007, and Eric sought to bring E. S. S. back to the United States that Janea "retained" E. S. S.).

4. *Sorenson*, 563 F. Supp. 2d at 963; see also Appellant's Brief at \*10, *Sorenson v. Sorenson*, No. 08-2098 (8th Cir. filed July 10, 2008), 2008 WL 3977191.

5. *Sorenson*, 563 F. Supp. 2d at 963; see also Appellant's Brief, *supra* note 3, at \*10-11 (describing the infeasibility of maintaining the Minnesota home while in Australia).

6. *Sorenson*, 563 F. Supp. 2d at 963; see also Appellant's Brief, *supra* note 3, at \*13 (discussing Janea's extramarital affair); Appellee's Brief at \*9, *Sorenson v. Sorenson*, No. 08-2098 (8th Cir. filed Aug. 12, 2008), 2008 WL 3977192 (describing the rapid deterioration of the marriage upon arrival in Australia).

7. *Sorenson*, 563 F. Supp. 2d at 964; see also Appellant's Brief, *supra* note 3, at \*13-14.

8. *Sorenson*, 563 F. Supp. 2d at 964; see also Appellant's Brief, *supra* note 3, at \*14-15; Appellee's Brief, *supra* note 6, at \*10.

9. *Sorenson*, 563 F. Supp. 2d at 964.

10. *Id.*; see also Appellant's Brief, *supra* note 3, at \*15.

11. Appellant's Brief, *supra* note 3, at \*15. The U.S. Central Authority is the primary contact for child abductions to and from the United States. It is through this office that Child Abduction Convention petitions can be filed. See United States of America—Central Authority, Hague Conference on Private International Law, [http://hcch.e-vision.nl/index\\_en.php?act=authorities.details&aid=133](http://hcch.e-vision.nl/index_en.php?act=authorities.details&aid=133) (last visited Apr. 3, 2009); U.S. Department of State, Using the Hague Convention, [http://www.travel.state.gov/family/abduction/Solutions/Solutions\\_3854.html](http://www.travel.state.gov/family/abduction/Solutions/Solutions_3854.html) (last visited Apr. 3, 2009).

12. Appellant's Brief, *supra* note 3, at \*15; Appellee's Brief, *supra* note 6, at \*11. After the district court determined that E. S. S.'s habitual residence was Australia, Eric Sorenson appealed the case to the U.S. Court of Appeals for the Eighth Circuit, arguing that the

never intended to abandon the United States as its habitual residence and had planned on returning upon the expiration of their three-year visas.<sup>13</sup> Janea argued that there had been no intention to return to the United States and that the family had settled into a new life in Australia.<sup>14</sup>

The district court, bound by the U.S. Court of Appeals for the Eighth Circuit's holding in *Silverman v. Silverman*,<sup>15</sup> applied a two-factor test that looked at Eric and Janea's shared intentions as well as factual evidence of E. S. S.'s acclimatization.<sup>16</sup> The court determined that the Sorensons' shared intention was to reside in Australia.<sup>17</sup> The court relied on the fact that the family had sold their house and cars prior to moving to Australia and brought most of their personal belongings with them to Australia.<sup>18</sup> As indicators of E. S. S.'s acclimatization, the court noted that E. S. S. had enrolled in preschool in Australia, spoke with an Australian accent, had Australian friends, and had spent the majority of her life in Australia.<sup>19</sup> Because both prongs of the inquiry indicated the same result, the court concluded that E. S. S.'s habitual residence immediately before her retention was Australia.<sup>20</sup>

The facts on which the Minnesota District Court based its holding are remarkably similar to the facts of countless other Child Abduction Convention cases. More importantly, the critical question the court faced—what was E. S. S.'s habitual residence at the time of her retention—is a question that courts around the country (indeed, around the world) are asked to decide with increasing frequency. The concept of habitual residence is the most important threshold determination in Child Abduction Convention proceedings.<sup>21</sup> First, it is the law of the child's habitual residence that will decide whether one parent's custody rights have been breached through a wrongful removal or retention.<sup>22</sup> Second, a child must be immediately returned to the country of habitual residence.<sup>23</sup>

Despite its importance, a lack of guidance as to the definition of habitual residence has led to a split among courts on how to properly determine a

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district court had focused too much on evidence of acclimatization. See Appellant's Brief, *supra* note 3, at \*21.

13. Appellant's Brief, *supra* note 4, at \*23; Appellee's Brief, *supra* note 6, at \*15.

14. Appellee's Brief, *supra* note 6, at \*15.

15. 338 F.3d 886 (8th Cir. 2003). For a complete discussion of *Silverman v. Silverman*, see *infra* notes 216–23 and accompanying text.

16. *Sorenson v. Sorenson*, 563 F. Supp. 2d 961, 969–70 (D. Minn. 2008).

17. *Id.* at 969 (“[The Sorensons] did not have a definite intention to return to the United States . . . . Their shared intention was to live in Australia for an indefinite period of time, lasting at least three years.”).

18. *Id.* at 970; see also *supra* note 5 and accompanying text.

19. *Sorenson*, 563 F. Supp. 2d at 970; see also *infra* app.

20. *Sorenson*, 563 F. Supp. 2d at 969.

21. Michael R. Walsh & Susan W. Savard, *International Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 32 (2006).

22. Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1063 (2005).

23. *Id.*

child's habitual residence.<sup>24</sup> On the one hand, the U.S. Courts of Appeals for the Third and Ninth Circuits have developed a standard for determining a child's habitual residence that emphasizes the parents' shared intentions.<sup>25</sup> While the Third Circuit, like the Eighth Circuit in *Silverman*, has attempted to balance evidence of the child's acclimatization with shared parental intentions,<sup>26</sup> the Ninth Circuit has concluded that the primary focus should be on the parents' shared intentions.<sup>27</sup> Even where there is no shared intent, the Ninth Circuit warns against relying on objective facts unless they point "unequivocally" to a change in habitual residence.<sup>28</sup> On the other hand, the U.S. Court of Appeals for the Sixth Circuit has rejected any reliance on shared parental intent and refocused the inquiry solely on the child's past experiences leading up to the moment of removal.<sup>29</sup> This divergence serves to frustrate the Child Abduction Convention's goal of uniformity in interpretation of its terms.<sup>30</sup>

This Note proposes that a uniform standard is necessary to achieve the aims of the Child Abduction Convention and that the Sixth Circuit's objective approach best effectuates the convention's intent. The intermediate approach of the Third and Eighth Circuits, while understandable in their desire to factor in an assessment of parental subjective intentions, needlessly complicates what was intended to be a clean and summary inquiry. Part I of this Note examines the historical origins of the Child Abduction Convention, its objectives, and its text. Part I also briefly discusses the International Child Abduction Remedies Act (ICARA)<sup>31</sup>—the statute enacted by Congress to give the Child Abduction Convention domestic effect. Finally, Part I explores early consideration of habitual residence by the Sixth Circuit.

Part II details the split among the federal appellate courts on the proper way to determine "habitual residence." The current split is deep, but lopsided. Among the six circuits to have addressed the issue, the U.S. Courts of Appeals for the Second, Third, Eighth, Ninth, and Eleventh Circuits all adhere to some consideration of shared parental intent, while the Sixth Circuit hews to an objective-evidence-only standard. Part II also surveys the decisions of a number of foreign courts on the crucial issue of habitual residence. Such a survey is not only authorized by the implementing statute's express language, it is also of possible use to future American court decisions, particularly to the U.S. Supreme Court, should it decide to resolve this split by granting certiorari in a suitable Child Abduction Convention case.

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24. See *infra* Parts I.B.2, II.A–B.

25. See *Mozes v. Mozes*, 239 F.3d 1067, 1079 (9th Cir. 2001); *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995); see also *infra* Part II.A.

26. *Feder*, 63 F.3d at 224.

27. *Mozes*, 239 F.3d at 1076.

28. *Id.* at 1081.

29. *Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007); see also *infra* Part II.B.

30. See *infra* Part I.B.1.

31. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2006).

Part III applies the different standards to the facts of the *Sorenson* case. Specifically, it shows how the majority approach of factoring in shared subjective intent (particularly the Ninth Circuit's most extreme version) complicates an otherwise easy determination of habitual residence. Part III then argues that the Sixth Circuit's approach, which, though the minority approach in the United States, is reflected in the majority of foreign precedents and should be adopted by all the circuits and American state courts. Part III concludes by addressing how the Sixth Circuit's standard best accomplishes the objectives of the Child Abduction Convention.

## I. AN OVERVIEW OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Some background information about the Child Abduction Convention's development and text is necessary in order to fully understand how a court should determine a child's habitual residence and the circuit split that has developed over the proper standard for this determination. Part I.A first examines international child abductions prior to the drafting of the Child Abduction Convention in 1980. Part I.B.1 looks at the Child Abduction Convention drafters' purposes and objectives. Part I.B.2 discusses the text of the Child Abduction Convention and, notably, the drafters' silence as to the definition of habitual residence. Part I.C briefly turns to the passage of ICARA in 1988<sup>32</sup> and how the United States has chosen to apply the Child Abduction Convention. Part I.D discusses the sources a court may turn to for guidance in interpreting the Child Abduction Convention in a manner that is aligned with the convention's goal of uniform interpretation. Finally, Part I.E outlines the beginning of American case law regarding the habitual residence determination for the purpose of Child Abduction Convention proceedings.

### A. *International Child Abductions Prior to 1980*

"Child abduction" is defined as any instance where a child is taken away, without consent or lawful authority, from a person whom the law recognizes as having a right to care for the child.<sup>33</sup> "International" child abduction is any instance of child abduction that occurs across an international frontier.<sup>34</sup> While the term "international child abduction" may have a number of different meanings,<sup>35</sup> for the purpose of the Child Abduction Convention and this Note, "the phrase [is] synonymous with the unilateral removal or retention of children by parents, guardians or close

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32. International Child Abduction Remedies Act, Pub. L. No. 100-300, § 2, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. §§ 11601-11611).

33. ANNE-MARIE HUTCHINSON & HENRY SETRIGHT, INTERNATIONAL PARENTAL CHILD ABDUCTION 3 (1998).

34. *Id.*

35. PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 1 (1999) ("The expression 'child abduction' . . . is sufficiently wide in meaning to suggest a variety of possible acts, all wrongful and almost invariably harmful to the children involved.").

family members.”<sup>36</sup> Wrongful removals and retentions are most often initiated by mothers who have moved abroad with the father of their children and who then wish to return to their country of origin.<sup>37</sup> Typically, the abducting parent’s objective is to gain sole control over the child in a new jurisdiction.<sup>38</sup>

Assessment of the motives for child abduction depends to some extent on whose perspective is analyzed.<sup>39</sup> The abducting parent may believe that he or she is acting in the child’s best interest, for instance by removing the child from a dangerous situation or raising the child in a more suitable environment.<sup>40</sup> Or the abducting parent might simply be tired of the relationship, or his or her life in a certain country, and wish to return to familiar surroundings with the child.<sup>41</sup> On the other hand, the left-behind parent might view the abduction as retaliation for ending the marriage.<sup>42</sup>

International child abductions did not receive specific recognition as an issue requiring an international legal solution until the late 1970s,<sup>43</sup> when they were identified as the result of certain “socio-legal and technical developments.”<sup>44</sup> International travel had become easier, and more couples

36. *Id.* (contrasting this definition with “classic kidnappings” where a third party or stranger is the abductor); see also *Rapport Explicatif de Mlle Elisa Pérez-Vera* [*Explanatory Report by Elisa Pérez-Vera*], in 3 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, ENLÈVEMENT D’ENFANTS [HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION] 426, 428 (1982) [hereinafter *Pérez-Vera Report*] (noting that “the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child”).

37. BEAUMONT & MCELEAVY, *supra* note 35, at 3–4, 9. This contrasts with the traditional, “paradigm case . . . of the father who became so frustrated with being denied access to his child or children after the court had granted sole custody to the mother, that he stole the child, went abroad, and then underground.” *Id.* at 9.

38. *Id.* at 1 (distinguishing this from the “classic kidnapping” objective of material gain).

39. *Id.* at 11 (“It . . . depends whether one assesses the issue from the perspective of the abductor, or that of the left-behind parent.”).

40. *Id.*

41. *Id.* at 11 & n.26 (“It may be noted that the initial relocation of the family may itself have represented an attempt to ‘mend’ an ailing relationship.”).

42. *Id.* at 11.

43. *Id.* at 2–3 (“The origins of international child abductions cannot readily be attributed to any one cause or event.”).

44. *Id.* at 2; see also Adair Dyer, *Rapport sur L’enlèvement International D’un Enfant par Un de Ses Parents («Kidnapping Légal»)* [Report on International Child Abduction by One Parent (‘Legal Kidnapping’)] (1978), in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION, *supra* note 36, at 12, 18 [hereinafter *Dyer Report*] (stating that statistics on international child abductions were not readily available, but it is generally agreed that there had been a rapid increase in recent years as a result of a number of underlying factors). The responses to a questionnaire that asked various governments whether they had statistics relating to international child abductions show that very few, if any, statistics were available. *Réponses des Gouvernements au Questionnaire* [Replies of the Governments to the Questionnaire] (February 1979), in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION, *supra* note 36, at 61 *passim*.



were travelling across national borders.<sup>45</sup> The ease of international travel also resulted in a greater number of international marriages.<sup>46</sup> At the same time, the institution of marriage was changing, with an increase in the number of separations, divorces, and children born outside of marriage.<sup>47</sup> The confluence of all these developments led to an increase in child custody disputes with international dimensions.<sup>48</sup> The advancements in technology that facilitated the “rapid and efficacious interchange of people on the international level” also enabled the abducting parent to whisk a child thousands of miles away from the left-behind parent in a matter of hours.<sup>49</sup>

Research into the rise in international child abductions revealed a number of inherent difficulties in the proceedings then in force to deal with the problem:<sup>50</sup> first, locating children taken across national borders was difficult; second, international disputes were expensive and complicated to resolve; third, local and foreign authorities were often unable or unwilling to provide assistance; and fourth, characterizing and labeling the problem was a challenge for the courts.<sup>51</sup>

In addition, international child abduction proceedings were typically lengthy because courts were reluctant to take any action without investigating what would be in the best interests of the abducted child.<sup>52</sup>

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45. Carol S. Bruch, *The Hague Child Abduction Convention: Past Accomplishments, Future Challenges*, in GLOBALIZATION OF CHILD LAW: THE ROLE OF THE HAGUE CONVENTIONS 33, 34 (Sharon Detrick & Paul Vlaardingerbroek eds., 1999); see also BEAUMONT & MCELEAVY, *supra* note 35, at 2 (noting the increase in individual mobility); *Dyer Report*, *supra* note 44, at 18–19 (finding that “freer crossing of borders, fewer visa requirements and decreasing rigour of passport control” contributed to more international movement and greater opportunity for international child abductions).

46. See *Dyer Report*, *supra* note 44, at 19 (“The usual underlying condition for the carrying out of a child abduction by a parent on the international level is, of course, an ‘international’ family. Here once again the statistics available are not satisfying, but it seems apparent that for the same reasons as stated above the number of marriages between persons coming from different countries (and even from different continents) has increased in absolute and in relative terms.”); see also BEAUMONT & MCELEAVY, *supra* note 35, at 10 & n.21 (discussing the fact that 15.9% of all abductions in the United States resulted from marriages between parents with different countries of origin (citing R. L. Hegar & G. L. Greif, *Parental Abduction of Children from Interracial and Cross Cultural Marriages*, 25 J. COMP. FAM. STUD. 135, 138 (1994))). For a discussion of the current economic crisis’s effect on international marriages, the complexities of international divorces, and the resulting increase in international child abductions, see *Money in Misery*, *ECONOMIST*, Feb. 7, 2009, at 21.

47. See, e.g., BEAUMONT & MCELEAVY, *supra* note 35, at 2 n.10 (discussing the rise in divorces in the United Kingdom).

48. See Bruch, *supra* note 45, at 34.

49. *Dyer Report*, *supra* note 44, at 18.

50. See Bruch, *supra* note 45, at 34 (noting that the *Dyer Report* identified “global problems without global solutions”).

51. BEAUMONT & MCELEAVY, *supra* note 35, at 3 (discussing the many reasons why the chances of recovering an abducted child prior to the Child Abduction Convention were limited); Bruch, *supra* note 45, at 34 (“Overwhelming practical difficulties ranged from locating an abducted child, to the expense and logistics of handling an international dispute, to obtaining assistance from local and foreign authorities. Legal difficulties were equally daunting: even characterizing and labeling the problem were challenges . . .”).

52. See BEAUMONT & MCELEAVY, *supra* note 35, at 3.

This best-interests analysis required a personalized inquiry into the interests of every abducted child.<sup>53</sup> However, the vague and indeterminate nature of such a standard made application difficult.<sup>54</sup> This analysis prolonged the proceedings, which impacted the child as well as the court.<sup>55</sup> Such an individualized determination also failed to offer any predictability and allowed courts to "take almost any conceivable measure . . . often influenced by the moral or social values which prevail[ed] in the society in question."<sup>56</sup> At the same time, many countries did not use a best-interests standard, preferring to rely on traditional modes of analysis, which often exhibited a gender bias.<sup>57</sup> A left-behind parent also typically had difficulty attempting to enforce his or her rights in the home country, since the abducted child was no longer within that country's borders or subject to its jurisdiction.<sup>58</sup> The left-behind parent was usually forced to pursue a remedy, if one existed, in the courts of the country in which the child was physically present.<sup>59</sup> This often resulted in situations where the differing legal systems and laws in the home country and the country in which the child was physically present conflicted.<sup>60</sup> Left-behind parents faced the risk that a court's decision would reflect particular cultural or social attitudes that were at odds with those in their home courts.<sup>61</sup> This lack of uniformity and predictability was an impetus for the drafting of an

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53. *Id.* at 29 ("Ordinarily in private-law proceedings [best interests] would be applied on an individual basis with the court acting to secure the particular child's welfare.").

54. *Dyer Report*, *supra* note 44, at 22–23 (finding the standard unclear on whether the interests of the child that are to be served are "those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age").

55. *Id.* at 23–24 (discussing how time is an important factor in the adjustment of the child and courts may find it difficult to require the return of a child who has been forced to adjust to a new situation for a long period of time).

56. BEAUMONT & MCELEAVY, *supra* note 35, at 2.

57. *Dyer Report*, *supra* note 44, at 22 (reporting that, while "the legal standard used in most of the countries of the Hague Conference for determination of the custody and care of a child is keyed to 'the best interests of the child[,]'. . . a large number of countries retain the more traditional legal standards for assignment of custody, which range from establishment of a presumption or an irrefutable right in favour of the parent of one sex or the other to systems where the legal dispute over custody centers around the 'fitness' or 'unfitness' of one of the parents, usually the mother, based on allegations of sexual conduct which may have little or nothing to do with the actual suitability of the parent to exercise the custody over and care of the child").

58. HUTCHINSON & SETRIGHT, *supra* note 33, at 3.

59. *Id.*; see also BEAUMONT & MCELEAVY, *supra* note 35, at 2 (indicating that "one must not overlook the absence of any viable legal remedy").

60. HUTCHINSON & SETRIGHT, *supra* note 33, at 3.

61. Pérez-Vera Report, *supra* note 36, at 431. For a discussion of various legal systems, see HUTCHINSON & SETRIGHT, *supra* note 33, at 61–225 (cataloguing the domestic law of thirty different jurisdictions); Bruch, *supra* note 45, at 44–47 (discussing Israel's application of religious law in the context of best interests analysis once a child has been returned). Adair Dyer, former deputy secretary general of the Hague Conference, only briefly mentioned the issue of jurisdiction in his preliminary report, finding the depth of discussion required to be beyond the scope of his report. *Dyer Report*, *supra* note 44, at 35–38.

international convention on child abduction.<sup>62</sup> While differences in choice of law were not of themselves a major concern,<sup>63</sup> efficiency was: if the deciding court chose to enter into a lengthy choice-of-law analysis it could significantly prolong the proceedings.<sup>64</sup> At the extreme, if the abducting parent had exclusive custody rights under the law of that country, the left-behind parent would be precluded from seeking any legal remedy.<sup>65</sup> There was a practical need for action to be taken to protect abducted children and their left-behind parents.<sup>66</sup> However, until the Hague Conference on Private International Law began discussing the issue in the late 1970s, all prior attempts to deal with these issues either failed at the drafting stage or in their initial implementation.<sup>67</sup>

*B. The Hague Convention on the Civil Aspects of International Child Abduction: A Response*

The Child Abduction Convention was introduced for consideration by a Special Commission convened at the Hague Conference on Private International Law in January 1976.<sup>68</sup> Once it was agreed that the issue of international child abduction would be addressed at the Fourteenth Session of the Hague Conference, Adair Dyer, then deputy secretary general of the Hague Conference, began researching the legal and sociological aspects of international child abductions.<sup>69</sup> The Special Commission for the Child Abduction Convention met for the first time in March 1979 to discuss an approach to the issue of international child abductions.<sup>70</sup> The Special Commission agreed that a central authority would be established in each member state to facilitate cooperation across borders, that a left-behind

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62. See Pérez-Vera Report, *supra* note 36, at 431; see also BEAUMONT & MCELEAVY, *supra* note 35, at 2 n.11 (observing that the same situation currently exists where children are abducted to non-member states).

63. Dyer Report, *supra* note 44, at 39 (declaring that the “artful abductor” would be unlikely to knowingly remove a child to a jurisdiction that would apply an unfavorable law).

64. *Id.*; see also *supra* note 55 and accompanying text.

65. Dyer Report, *supra* note 44, at 39.

66. See BEAUMONT & MCELEAVY, *supra* note 35, at 3.

67. *Id.* at 3 & nn.14–15 (finding that this was the case with what would have been Article 6 of the 1961 Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, as well as the 1980 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children).

68. *Id.* at 16–17; Dyer Report, *supra* note 44, at 12 (observing that the proposal was made by the Expert of Canada, T. Bradbrooke Smith, at a Special Commission meeting for the purpose of considering subjects to be included on the agenda for future conferences).

69. BEAUMONT & MCELEAVY, *supra* note 35, at 17. Dyer’s research was the basis for what this Note refers to as the Dyer Report. See Dyer Report, *supra* note 44 *passim*.

70. BEAUMONT & MCELEAVY, *supra* note 35, at 18; see also *Conclusions des Discussions de la Commission Spéciale de Mars 1979 sur le Kidnapping Légal* [Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping] (June 1979), in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION, *supra* note 36, at 162, 162 [hereinafter *Conclusions of the Special Commission*] (observing that the Special Commission had before it the Dyer Report).

parent could apply for automatic return of an abducted child within six months of the abduction, and that, even if more than six months had elapsed, a court could only assume jurisdiction for a merits hearing if it considered the child a habitual resident of that country.<sup>71</sup> These working principles would form the basis for the Special Commission's preliminary draft treaty.<sup>72</sup> The Child Abduction Convention in its present form was prepared during the Fourteenth Session of the Hague Conference from October 6 to October 25, 1980.<sup>73</sup> Reflecting the universal view that international child abductions were a serious problem that needed to be addressed, the Child Abduction Convention was adopted by a unanimous vote of the twenty-three countries present, including the United States, and immediately signed by four of those countries on October 25, 1980.<sup>74</sup> Currently, eighty-one countries, including the United States, are signatories to the Child Abduction Convention.<sup>75</sup>

### 1. Purposes and Objectives

The stated objectives of the Child Abduction Convention are twofold: "a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."<sup>76</sup> The deliberate wording of Article 1 ("prompt") ensured that courts in international child abduction proceedings no longer engaged in lengthy and detailed investigations into the best interests of the child.<sup>77</sup> The Child Abduction Convention envisions that a court presented

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71. See *Conclusions of the Special Commission*, *supra* note 70, *passim*; BEAUMONT & MCELEAVY, *supra* note 35, at 18–20. Under the Child Abduction Convention, the central authorities of the abducted-to and left-behind countries (assuming both are signatories to the convention) are responsible for processing petitions and coordinating proceedings. Thus, it is theoretically only necessary to file a petition in one country; however, there is nothing in the convention that prevents a left-behind parent from filing petitions in both countries.

72. BEAUMONT & MCELEAVY, *supra* note 35, at 20–22 (addressing the drafting process). Many of the Special Commission's discussions were catalogued in the report that accompanied the draft. *Rapport de la Commission Spéciale Établi par Mlle Elisa Pérez-Vera* [Report of the Special Commission by Elisa Pérez-Vera], in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION, *supra* note 36, at 172 *passim* [hereinafter *Report of the Special Commission*].

73. BEAUMONT & MCELEAVY, *supra* note 35, at 22–23 (discussing the meeting of the Fourteenth Session of the Hague Conference); *Pérez-Vera Report*, *supra* note 36, at 426 (noting that Elisa Pérez-Vera was appointed the reporter for both the Special Commission and during the fourteenth session of the Hague Conference).

74. *Pérez-Vera Report*, *supra* note 36, at 426 & n.1.

75. Hague Conference on Private International Law, Status Table, [http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=24](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24) (last visited Apr. 3, 2009).

76. Child Abduction Convention, *supra* note 3, art. 1. When read together, the Preamble and Article 1 show that the drafters did not seek to protect children from the removal or retention itself because "a prima facie wrongful removal or retention might actually serve a child's interests." BEAUMONT & MCELEAVY, *supra* note 35, at 28–29.

77. BEAUMONT & MCELEAVY, *supra* note 35, at 29 ("It was imperative . . . that in its objectives [the Child Abduction Convention sought] to break the existing mindset before replacing it with its own model, the qualified summary-return mechanism."); see also Walsh & Savard, *supra* note 21, at 33 ("Evidence relevant to custody or the best interest of the

with an international child abduction case simply considers it as an application for an administrative return, rather than a full-blown traditional custody determination.<sup>78</sup> The drafters of the Child Abduction Convention recognized that one of the basic tenets of family law is the importance of a child's interests and welfare in matters relating to his or her custody; however that was not the goal that the Child Abduction Convention was designed to accomplish.<sup>79</sup> The goal of the Child Abduction Convention is to further the interests of all children affected by international child abductions collectively without individualized best-interests inquiries.<sup>80</sup> The Child Abduction Convention drafters sought to achieve this goal through the formulation of a single overarching rule: wrongfully removed or retained children must be returned to their habitual residence as quickly as possible.<sup>81</sup>

The practical purpose of the Child Abduction Convention is to recast the function of the courts of its member states according to this image of the return process. Under the Child Abduction Convention, proceedings are subject to a "summary-return mechanism."<sup>82</sup> Rather than deciding the merits of the substantive custody case, courts merely determine what a child's habitual residence is, whether a child has been wrongfully removed from his or her habitual residence or retained in a country other than his or her habitual residence, and, if so, order the child's return so that the court of the child's habitual residence can decide the underlying substantive custody issues.<sup>83</sup> This enables a restoration of the status quo and allows a child to be returned to the place with which he or she is most familiar and has the greatest connection, and, accordingly, where the authorities are "best placed to determine the child's future."<sup>84</sup> The application of a single rule promotes

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child are excluded, and the inquiry is limited to whether the child has been wrongfully removed or wrongfully retained from his nation of habitual residence." (citing *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995)).

78. Silberman, *supra* note 22, at 1063.

79. BEAUMONT & MCELEAVY, *supra* note 35, at 29; *Pérez-Vera Report*, *supra* note 36, at 431 ("[The] two paragraphs in the preamble reflect quite clearly the philosophy of the [Child Abduction] Convention . . . [T]he struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests.").

80. BEAUMONT & MCELEAVY, *supra* note 35, at 29 & n.8 (indicating that the novelty of the Child Abduction Convention lies in the fact "that the welfare of the individual child is not the first and paramount consideration"); see also *Report of the Special Commission*, *supra* note 72, at 182 (discussing the place given to the interests of the child); *Pérez-Vera Report*, *supra* note 36, at 431 (explaining why there is no explicit reference to "best interests" in the Child Abduction Convention); *supra* notes 52–56 and accompanying text (discussing the difficulties a best interests analysis posed).

81. BEAUMONT & MCELEAVY, *supra* note 35, at 29–30.

82. *Id.* at 29.

83. *Id.* at 29–30; Silberman, *supra* note 22, at 1063 (finding that "the usual kind of 'best interests' evaluation that a judge makes in a custody case is not called for in a [Child Abduction Convention] case because the 'best interests' determination is to be made back in the courts of the State of the habitual residence *after* the child has been returned").

84. BEAUMONT & MCELEAVY, *supra* note 35, at 30; see also *Pérez-Vera Report*, *supra* note 36, at 430.

certainty and allows for expeditious handling of cases.<sup>85</sup> More importantly, the Child Abduction Convention discourages parents from unilaterally removing their children in order to use them as instruments to obtain a convenient and favorable forum in which to air their custody disputes.<sup>86</sup>

One other important procedural goal of the Child Abduction Convention's drafters was to maximize the convention's practical effectiveness through uniformity in interpretation and application among member states.<sup>87</sup> The importance of this goal lies in the need and desire of the drafters to establish a new standard for dealing with international child abduction cases.<sup>88</sup> Without this goal and the cooperation of the early member states, the Child Abduction Convention would have been severely weakened and would likely have failed as its predecessors did.<sup>89</sup> A number of factors have contributed to the promotion of a uniform interpretation, including an overwhelming aspiration to stop international child abductions and the simplicity of the Child Abduction Convention's text.<sup>90</sup>

## 2. What the Text Says (and Does Not Say)

The Child Abduction Convention applies to any child under the age of sixteen who was habitually resident in a member state immediately before his or her wrongful removal or retention.<sup>91</sup> The Child Abduction Convention considers a removal or retention of a child wrongful where

*a* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

*b* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.<sup>92</sup>

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85. BEAUMONT & MCELEAVY, *supra* note 35, at 30; *see also supra* Part I.A (discussing the uncertain, lengthy proceedings that occurred prior to the Child Abduction Convention).

86. Silberman, *supra* note 22, at 1054; *see also* BEAUMONT & MCELEAVY, *supra* note 35, at 30 (describing how awareness of the Child Abduction Convention will deter parents from "removing or retaining [their] children abroad"); Pérez-Vera Report, *supra* note 36, at 429 ("[I]t can firmly be stated that the problem with which the [Child Abduction] Convention deals . . . derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial.").

87. BEAUMONT & MCELEAVY, *supra* note 35, at 226; *see also In re H*, [1998] A.C. 72, 87 (H.L.) (appeal taken from Eng.) (U.K.) ("An international Convention . . . cannot be construed differently in different jurisdictions. The [Child Abduction] Convention must have the same meaning and effect under the laws of all contracting states.").

88. BEAUMONT & MCELEAVY, *supra* note 35, at 226.

89. *Id.*; *see also supra* note 67 and accompanying text.

90. BEAUMONT & MCELEAVY, *supra* note 35, at 226.

91. Child Abduction Convention, *supra* note 3, art. 4; *see also* BEAUMONT & MCELEAVY, *supra* note 35, at 36-37 (emphasizing that a child older than sixteen is presumed to have a mind of his or her own that cannot be ignored).

92. Child Abduction Convention, *supra* note 3, art. 3; *see also* BEAUMONT & MCELEAVY, *supra* note 35, at 37-44 (defining wrongful retention or removal).

Article 5 goes on to define such terms as “rights of custody” and “rights of access.”<sup>93</sup> A right of custody is any right relating to the care of the child, particularly the right to determine a child’s residence, whereas a right of access includes the right to take a child for a limited time away from the child’s habitual residence.<sup>94</sup> These rights represent “an identifiable legal link between an individual and a child. If either right is breached, the legally responsible individual who has been disadvantaged will be able to petition for its restoration.”<sup>95</sup> This enables a restoration of the status quo in the child’s interests.<sup>96</sup>

While the Child Abduction Convention is explicit in its definition of certain key terms, this Note focuses on one important aspect of the Child Abduction Convention that the drafters left undefined in the text: habitual residence. The habitual residence determination is the basis on which the Child Abduction Convention’s “summary return mechanism” is founded.<sup>97</sup> The importance of determining a child’s habitual residence is underscored by the inclusion of the term in various articles of the Child Abduction Convention. First, the objective of any Child Abduction Convention is to return a wrongfully removed or retained child to his or her habitual residence.<sup>98</sup> In addition, a child must be habitually resident in a member state in order for a proceeding to fall under the Child Abduction Convention.<sup>99</sup> Finally, a child’s habitual residence plays a critical role in determining whether a child was, in fact, wrongfully removed or retained under the Child Abduction Convention’s definition:<sup>100</sup>

[I]n laying down the conditions which have to be met for any unilateral change in the *status quo* to be regarded as wrongful, [Article 3] indirectly brings into clear focus those relationships which the [Child Abduction] Convention seeks to protect. Those relationships are based upon . . . the existence of rights of custody attributed by the State of the child’s habitual residence . . . .<sup>101</sup>

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93. Child Abduction Convention, *supra* note 3, art. 5.

94. *Id.* The issue of rights of custody and access are not important for this Note, but simply serve to show the deliberate choice the Child Abduction Convention drafters made to define certain terms, but not others. For a discussion of rights of custody, see BEAUMONT & MCELEAVY, *supra* note 35, at 45–87.

95. BEAUMONT & MCELEAVY, *supra* note 35, at 86.

96. *Id.*

97. *Id.* at 88.

98. See Child Abduction Convention, *supra* note 3, pmbl.; see also Silberman, *supra* note 22, at 1063 (“[I]f the child is already at the habitual residence, there is no need for return.”).

99. See Child Abduction Convention, *supra* note 3, art. 4; see also BEAUMONT & MCELEAVY, *supra* note 35, at 39 (“[T]he essential element in a wrongful removal is the fact that a child habitually resident in one Contracting State is moved to another Contracting State.”).

100. See Child Abduction Convention, *supra* note 3, art. 3; see also Pérez-Vera Report, *supra* note 36, at 444 (“[T]he duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention.”).

101. Pérez-Vera Report, *supra* note 36, at 444. “The [Child Abduction] Convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the State of the child’s habitual residence.” *Id.*

Despite the importance that determining a child's habitual residence plays in Child Abduction Convention proceedings, it is a tradition of the Hague Conferences not to define this term.<sup>102</sup> However it is considered a "well-established concept" in the Hague Conferences that habitual residence is different from the concept of domicile.<sup>103</sup> Domicile requires an intent to reside in a country of choice permanently or indefinitely, as well as actual physical presence in that country.<sup>104</sup> One must have, in addition to an intent to reside in the country of new domicile, an intent to leave the country of previous domicile.<sup>105</sup> Consideration of a person's intention to remain in a place is complex and intricate, and courts must often make determinations of domicile without the guidance of concrete rules.<sup>106</sup>

In contrast, it has been deemed essential to treat the term "habitual residence" according to the ordinary and natural meaning of the two words.<sup>107</sup> "Residence" implies something more than mere presence in a country.<sup>108</sup> "Habitual" indicates a quality of residence, duration being only one relevant factor.<sup>109</sup> Putting these words together, "habitual residence" might mean a "regular physical presence which must endure for some time."<sup>110</sup> The use of habitual residence as a legal standard results, first, from the plain fact that a domiciliary-style intent test would be complicated to apply to children and, second, from its flexibility, as opposed to that of the concepts of domicile and nationality, in responding to the demands of our society.<sup>111</sup> This flexibility is also the reason why the Hague Conference

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102. *Id.* at 441, 451; see also A. V. DICEY & J. H. C. MORRIS, DICEY & MORRIS ON THE CONFLICT OF LAWS para. 6-123 (Lawrence Collins ed., 13th ed. 2000) ("No definition of habitual residence has ever been included in a Hague Convention; this has been a matter of deliberate policy.").

103. *Pérez-Vera Report*, *supra* note 36, at 445. The *Pérez-Vera Report* also states that habitual residence is a question of pure fact. *Id.* This Note declines to address what the proper standard of review for a habitual residence determination should be. It is generally agreed by the circuits that there should be a mixed standard of review; a district court's findings of fact should be reviewed for clear error, and its legal determination and application of the law to the facts should be reviewed de novo. See, e.g., *Ruiz v. Tenorio*, 392 F.3d 1247, 1251 (11th Cir. 2004).

104. DICEY & MORRIS, *supra* note 102, para. 6-005. The United States, showing its common-law roots, has an identical definition of domicile. See, e.g., 28 C.J.S. *Domicile* § 6 (2008) (noting that the addition of intent to remain in a place is the distinguishing factor between domicile and residence); 25 AM. JUR. 2D *Domicil* § 6 (2004) ("Domicil of choice, generally, consists of a bodily presence in a particular locality and a concurrent intent to remain there permanently or at least indefinitely").

105. DICEY & MORRIS, *supra* note 102, para. 6-039.

106. *Id.* para. 6-048 ("There is . . . no circumstance or group of circumstances which furnishes any definite criterion of the existence of the intention. A circumstance which is treated as decisive in one case may be disregarded in another, or even relied upon to support a different conclusion.").

107. *Id.* para. 6-123 (contrasting this with domicile, which is essentially a term of art).

108. See *id.* para. 6-115. Residence can also be established without any mental element. *Id.* para. 6-034.

109. *Id.* para. 6-124 (quoting *Cruse v. Chittum* [1974] 2 All E.R. 940, 942 (H.L.) (appeal taken from Eng.) (U.K.)). This can be compared with "ordinary residence," which implies "an element of continuity, order, or settled purpose." *Id.* para. 6-118.

110. *Id.* para. 6-124 (quoting *Cruse*, 2 All E.R. at 942).

111. BEAUMONT & MCELEAVY, *supra* note 35, at 89.



and the convention drafters have traditionally found the need for definition futile.<sup>112</sup> Despite its lack of definition, the concept of habitual residence has been “closely connected with the Hague Conference and for many years has been regarded as the primary connecting factor employed in initiatives undertaken by that body.”<sup>113</sup> While the drafters believed that such flexibility and ambiguity would allow courts to come to the most appropriate solution in most cases, the concept had yet to be applied by courts in international child abduction cases.<sup>114</sup>

However, in the years following the adoption of the Child Abduction Convention by the original signatory states, a large body of case law has developed regarding how a court should determine a child’s habitual residence.<sup>115</sup> Some of this case law has restrained the discretion of judges in determining whether a habitual residence has been gained or lost and impeded the fulfillment of the drafters’ goal that habitual residence ought to designate the forum conveniens for subsequent hearings on the merits of the underlying custody case.<sup>116</sup> This combination of judicial recognition of the importance of the habitual residence determination and the Child Abduction Convention text’s ambiguity as to the proper definition of habitual residence practically guarantees that there will be a conflict among courts as to the proper standard to be used in determining a child’s habitual residence.

### C. *The International Child Abduction Remedies Act (ICARA)*

While the United States was one of the original countries that voted to adopt the Child Abduction Convention on October 25, 1980, it did not become a signatory until December 23, 1981.<sup>117</sup> Furthermore, the United States did not officially make the Child Abduction Convention effective as a matter of domestic law until Congress enacted ICARA on April 29, 1988.<sup>118</sup> Implementing legislation was required because the Child

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112. *Id.*; see also DICEY & MORRIS, *supra* note 102, para. 6-123 (indicating that “the aim [was] to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems”).

113. BEAUMONT & MCELEAVY, *supra* note 35, at 88.

114. *Id.* at 89.

115. *Id.* at 90; see also Rhona Schuz, *Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context*, 11 J. TRANSNAT’L L. & POL’Y 101, 103 (2001) (discussing how the reports of the Special Commission “pay only limited attention to the issue of determining habitual residence” because they presume that there is little difficulty in determining habitual residence and yet there is considerable difficulty in determining habitual residence in “borderline” cases that involve relocation).

116. BEAUMONT & MCELEAVY, *supra* note 35, at 90.

117. See Hague Conference on Private International Law, *supra* note 75; see also BEAUMONT & MCELEAVY, *supra* note 35, at 23 (noting that Canada, France, Greece, and Switzerland signed on October 25, 1980); *Pérez-Vera Report*, *supra* note 36, at 426 n.1.

118. International Child Abduction Remedies Act, Pub. L. No. 100-300, § 2, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. §§ 11601–11611 (2006)); see also HUTCHINSON & SETRIGHT, *supra* note 33, at 210; Hague Conference on Private International Law, *supra* note 75.

Abduction Convention was not self-executing in the United States.<sup>119</sup> With its passage, ICARA incorporated by reference the Child Abduction Convention<sup>120</sup> and detailed procedures for how the Convention would be implemented in the United States.<sup>121</sup> For instance, ICARA established concurrent jurisdiction between state and federal courts over Child Abduction Convention proceedings.<sup>122</sup> ICARA also specified that the petitioner has the burden of showing, by a preponderance of the evidence, that a child has been wrongfully removed or retained.<sup>123</sup> However, with respect to the substantive terms, American courts must still, as the Supreme Court has shown, look directly to the Child Abduction Convention for guidance.<sup>124</sup>

#### D. *Methods of Achieving a Uniform Interpretation*

Despite the drafters' goal of uniformity in interpretation, there is no international tribunal vested with authoritative interpretive power.<sup>125</sup> While the Convention's text is relatively simple,<sup>126</sup> this lack of overarching guidance has important implications for certain terms, such as habitual residence, on which the text is silent.<sup>127</sup> Foremost, there is the potential that the goals of the Child Abduction Convention will be impeded.<sup>128</sup> A judge in a national court has a twofold role in every Child Abduction Convention proceeding: he is pronouncing national law because the treaty is a part of the national law of each country that signs it, but he is also

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119. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) ("[T]he intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement."); see also BEAUMONT & MCELEAVY, *supra* note 35, at 248 & n.60 (comparing the United States with France, where the Child Abduction Convention is self-executing).

120. 42 U.S.C. § 11601(b)(2) ("The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.").

121. *Id.* § 11601(b)(1).

122. *Id.* § 11603(a); Walsh & Savard, *supra* note 21, at 51.

123. 42 U.S.C. § 11603(e)(1).

124. See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (describing how the definition of the term "accident" was discerned from the Warsaw Convention's text and history).

125. Silberman, *supra* note 22, at 1057.

126. See *supra* note 90 and accompanying text.

127. Silberman, *supra* note 22, at 1057 ("[T]he effectiveness of the [Child Abduction] Convention is left in the hands of . . . the national courts that implement and interpret the Convention."); see also BEAUMONT & MCELEAVY, *supra* note 35, at 229 (noting that, while the simplicity of the text has reduced the difficulties of interpreting the Child Abduction Convention, there are still problematic areas).

128. Silberman, *supra* note 22, at 1059 ("If [Child Abduction] Convention cases become subject to varying national approaches and perspectives, neither of the core objectives of the treaty—detering abductions and directing adjudication of custody cases to the State of the child's habitual residence—will be possible."); see also *supra* Part I.B.1.

contributing to the development of international law, of which the treaty is an embodiment.<sup>129</sup> How should a court balance this conflict of national and international law, while remaining faithful to the goals of the Child Abduction Convention, when faced with interpreting and determining habitual residence?

One of the most important sources of guidance in interpreting international law is the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>130</sup> The Vienna Convention provides a framework for interpreting treaties founded on principles of customary international law.<sup>131</sup> Section 3 of the Vienna Convention, in particular, provides a number of rules for the interpretation of international treaties.<sup>132</sup> Article 31 mandates that a treaty be interpreted in good faith in accordance with the ordinary meaning of its terms given their context, objectives, and purpose.<sup>133</sup> In addition, Article 32 states,

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

leaves the meaning ambiguous or obscure; or

leads to a result which is manifestly absurd or unreasonable.<sup>134</sup>

Although the United States is a signatory to the Vienna Convention, the Senate has not ratified the treaty.<sup>135</sup> Thus, the Vienna Convention does not apply in the United States as a matter of domestic treaty law. However, many of the rules of interpretation memorialized in the Vienna Convention have force as expressions of customary international law.<sup>136</sup> In fact, the Supreme Court has advocated methods for interpreting international treaties similar to those laid out in the Vienna Convention. In a case that discussed the interpretation of the Warsaw Convention, the Supreme Court directed federal courts to give the words of a treaty a meaning that is consistent with

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129. Silberman, *supra* note 22, at 1057.

130. Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 [hereinafter Vienna Convention].

131. Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 437 (2004).

132. *Id.* at 438 (describing the goal of interpretation as "elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties" (quoting *Reports of the International Law Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 220, U.N. Doc. A/6309/Rev.1)).

133. Vienna Convention, *supra* note 130, art. 31, § 1.

134. *Id.* art. 32.

135. Criddle, *supra* note 131, at 443 (discussing the fact that, while the United States is a signatory to the Vienna Convention, the treaty entered into force on January 27, 1980, and remains, without U.S. ratification).

136. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. a (1987) (noting that, while the Vienna Convention does not strictly govern interpretation by courts, it "represents generally accepted principles and the United States has also appeared willing to accept them"); Criddle, *supra* note 131, at 443.

the shared expectations of the other signatory nations.<sup>137</sup> The Supreme Court recognized that interpreting multinational treaties differs from interpreting pure domestic law and acknowledged that treaties should be construed more liberally.<sup>138</sup> Indeed, the Court deemed it proper to refer to the records of a treaty's drafting and negotiation when interpreting its text.<sup>139</sup> The Court also advocated consideration of court opinions from other signatory countries when interpreting the text of international treaties.<sup>140</sup>

Thus, in interpreting the term "habitual residence" and deciding what the proper standard should be for determining a child's habitual residence, the circuits must consider not only American court precedent, but also the treatment of the Child Abduction Convention by other signatory countries.<sup>141</sup> Furthermore, the published "travaux préparatoires" of the Child Abduction Convention, the materials detailing the development and negotiation of the treaty,<sup>142</sup> provide endless information about the drafting history and debates that took place during the negotiations of the Child Abduction Convention and are another valuable aid for interpretation.<sup>143</sup>

137. *Air France v. Saks*, 470 U.S. 392, 399 (1985); see also *Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004).

138. *Air France*, 470 U.S. at 397 (citing *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)); Silberman, *supra* note 22, at 1060.

139. *Air France*, 470 U.S. at 400 (commenting on the fact that courts frequently refer to the "travaux préparatoires," documents that catalogue the development of a treaty, to resolve ambiguities in text); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. e (1987) (remarking that the U.S. Supreme Court is much more amiable toward the use of travaux préparatoires than the Vienna Convention). This is analogous to referring to a statute's legislative history in considering the intent of legislators where a statute's text is ambiguous. See 2 AM. JUR. 2D *Administrative Law* § 246 (2004).

140. *Air France*, 470 U.S. at 404 ("[W]e 'find the opinions of our sister signatories to be entitled to considerable weight.'" (quoting *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978))); see also BEAUMONT & MCELEAVY, *supra* note 35, at 236 (discussing the Supreme Court's holding in *Air France* that considerable weight should be given to the well-reasoned opinions of other member states); Silberman, *supra* note 22, at 1062 ("With respect to courts in the United States faced with an issue of interpretation of the [Child Abduction] Convention, the Supreme Court in the *Air France v. Saks* case made particular reference to the desirability of looking to the opinions of other signatory countries in interpreting an international convention.").

141. While American courts have looked to other common-law jurisdictions for guidance on the habitual residence inquiry, there are a number of cases from civil-law jurisdictions that have largely been ignored. See *infra* Part II.C.

142. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. e (1987).

143. See Criddle, *supra* note 131, at 452, 455; Silberman, *supra* note 22, at 1060-61 ("The direction to consult supplementary materials is particularly important in respect to the [Child] Abduction Convention because . . . the 'travaux préparatoires' of the Convention are easily accessible in the *Acts and Documents of the 14th Session (Tome III) on Child Abduction*, Oct. 6-25, 1980. Included in that material is the Pérez-Vera Explanatory Report, which serves as the official commentary on the Convention." (citing 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION, *supra* note 36)).

*E. The Beginning of American Habitual Residence Jurisprudence*

The first major case in the United States to consider the issue of habitual residence for the purpose of Child Abduction Convention proceedings was *Friedrich v. Friedrich*.<sup>144</sup> In 1993, the Sixth Circuit addressed the case of Thomas, the German-born son of Jeana, a U.S. citizen stationed at the army base in Bad Aibling, Germany, and Emanuel, a German citizen employed on the base as a bartender.<sup>145</sup> The Friedrichs' three years of marriage were filled with arguments, informal separations, and reconciliations.<sup>146</sup> On August 1, 1991, after a particularly heated argument, Jeana left Germany with Thomas for the United States.<sup>147</sup>

At the time the Sixth Circuit addressed the issue of habitual residence, there was very little case law on the Child Abduction Convention worldwide and no case law in the United States to provide guidance.<sup>148</sup> The court held that "habitual residence pertains to customary residence prior to the removal[, and that t]he court must look back in time, not forward."<sup>149</sup> In rejecting any consideration of Mrs. Friedrich's intentions, the court stated that it was concerned solely with the child's habitual residence and rejected the parents' plans as irrelevant.<sup>150</sup> The court summarized that "habitual residence must not be confused with domicile. To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions."<sup>151</sup> Ultimately, the Sixth Circuit determined that Thomas's habitual residence was Germany and that his mother had wrongfully removed him to the United States.<sup>152</sup> Whether or not subsequent courts have chosen to follow the holding of *Friedrich*, the Sixth Circuit's analysis has provided the foundation for determining habitual residence in Child Abduction Convention proceedings before U.S. courts.<sup>153</sup>

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144. *Friedrich v. Friedrich (Friedrich I)*, 983 F.2d 1396 (6th Cir. 1993). The Sixth Circuit remanded to the district court the issue of whether, under German law, Emanuel Friedrich was exercising his custody rights at the time of removal and whether Jeana Friedrich had any affirmative defenses. *Id.* at 1403. The district court found that Mr. Friedrich was exercising his custody rights and Mrs. Friedrich had not established any affirmative defenses, and the case was again appealed to the Sixth Circuit. *Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1063 (6th Cir. 1996). *Friedrich II* affirmed the district court's holding, but did not revisit the issue of habitual residence and will not be discussed in this Note; *Friedrich I* will be referred to simply as "*Friedrich*."

145. *Friedrich I*, 983 F.2d at 1398.

146. *Id.* at 1399.

147. *Id.*

148. *Id.* at 1400–01.

149. *Id.* at 1401.

150. *Id.*

151. *Id.*

152. *Id.* at 1402.

153. See *infra* Part II.A–B.

## II. DECIDING WHAT A COURT SHOULD CONSIDER IN DETERMINING A CHILD'S HABITUAL RESIDENCE

Part I of this Note laid out the history and objectives of the Hague Convention on the Civil Aspects of International Child Abduction, focusing specifically on the importance of determining a child's habitual residence and the lack of guidance provided in defining "habitual residence." Part II further focuses on the ambiguity of what the proper habitual residence determination should be by exploring the judicial division that currently exists between the U.S. circuit courts, as well as between foreign common-law and civil-law courts.

In 1995, the Third Circuit in *Feder v. Evans-Feder*<sup>154</sup> defined the habitual residence determination as consisting of an analysis of the child's circumstances and the parents' shared intentions.<sup>155</sup> In 2001, the Ninth Circuit in *Mozes v. Mozes*<sup>156</sup> went even further by declaring that the principal focus of a court's analysis should be the parents' shared intentions.<sup>157</sup> The Ninth Circuit discouraged reliance on objective factors except where the facts "point unequivocally to a person's ordinary or habitual residence being in a particular place."<sup>158</sup> Contrary to the views of the Third and Ninth Circuits, the Sixth Circuit in *Friedrich*<sup>159</sup> and more recently in *Robert v. Tesson*<sup>160</sup> has consistently advocated the use of a purely objective analysis in determining a child's habitual residence.

Part II.A explains the approaches of the Third and Ninth Circuits and how the *Feder* and *Mozes* tests have influenced the majority of other circuits. Part II.B details how and why the Sixth Circuit chose to diverge from the reasoning of the Third and Ninth Circuits. Part II.C concludes by analyzing the division among foreign courts as to the proper standard for determining a child's habitual residence.

### A. The Third & Ninth Circuit Approach: Shared Parental Intent

The Third and Ninth Circuits share a similar method of determining a child's habitual residence when presented with a Child Abduction Convention proceeding. Part II.A.1 discusses the Third Circuit's standard as addressed in *Feder*. Part II.A.2 discusses the Ninth Circuit's standard as addressed in *Mozes*. Part II.A.3 considers how other circuits have been influenced by the *Feder* and *Mozes* standards.

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154. 63 F.3d 217 (3d Cir. 1995).

155. *Id.* at 224.

156. 239 F.3d 1067 (9th Cir. 2001).

157. *Id.* at 1076.

158. *Id.* at 1081 (quoting *Zenel v. Haddow* [1993] S.C. 612, 617 (Scot.)).

159. *Friedrich v. Friedrich (Friedrich I)*, 983 F.2d 1396, 1401 (6th Cir. 1993).

160. 507 F.3d 981, 993 (6th Cir. 2007).

1. Third Circuit: *Feder v. Evans-Feder*

Edward and Melissa-Ann Feder were American citizens who met and married in Germany in 1987.<sup>161</sup> Their only child, Evan, was born in Germany in 1990.<sup>162</sup> Soon after Evan's birth, the family moved back to the United States for Mr. Feder's job and, three years later, began making plans to move to Australia.<sup>163</sup> On January 8, 1994, Mr. and Mrs. Feder landed in Australia with Evan.<sup>164</sup> By May of that year, Mrs. Feder had decided to leave her husband and return to the United States with Evan.<sup>165</sup> Mr. Feder arranged round-trip tickets to Pennsylvania for Mrs. Feder and Evan, believing they were visiting her parents, but when he joined them a few weeks later, Mrs. Feder served him with divorce and custody papers.<sup>166</sup> In September 1994, Mr. Feder commenced an action in a Pennsylvania federal district court pursuant to the Child Abduction Convention alleging that Mrs. Feder had wrongfully retained Evan and requesting his return.<sup>167</sup>

As only the second federal court of appeals to have addressed the issue of habitual residence at that time, the Third Circuit, while recognizing the importance of habitual residence as a threshold issue in Child Abduction Convention proceedings, suffered from a dearth of guidance.<sup>168</sup> In reaching its definition of habitual residence, the Third Circuit relied on the nascent body of case law available<sup>169</sup>—the Sixth Circuit's decision in *Friedrich* and *In re Bates*,<sup>170</sup> a case from the United Kingdom. The Third Circuit highlighted important aspects of the *Friedrich* court's analysis, particularly that any habitual residence inquiry must focus on the child and look back in time, without regard to either parent's future intentions.<sup>171</sup> However, the Third Circuit relied mainly on what it considered to be the "governing principle" of *Bates*: that "there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. . . . All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."<sup>172</sup> The Third Circuit ultimately concluded that "a child's habitual

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161. *Feder v. Evans-Feder*, 63 F.3d 217, 218 (3d Cir. 1995).

162. *Id.*

163. *Id.*

164. *Id.* at 219.

165. *Id.*

166. *Id.* at 220.

167. *Id.* Edward Feder also commenced Child Abduction Convention proceedings simultaneously in Australia, where it was deemed that Evan Feder was a habitual resident of Australia and that Melissa-Ann Feder's retention was wrongful under the Convention. *Id.*

168. *Id.* at 222.

169. *Id.*

170. (1989) CA 122/89, slip op. (High Ct. of Justice, Fam. Div., Royal Cts. of Justice), [http://www.hiltonhouse.com/cases/Bates\\_uk.txt](http://www.hiltonhouse.com/cases/Bates_uk.txt).

171. *Feder*, 63 F.3d at 222 (quoting *Friedrich v. Friedrich* (*Friedrich I*), 983 F.2d 1396, 1401–02); see also *supra* Part I.E.

172. *Feder*, 63 F.3d at 223 (quoting *In re Bates*, (1989) CA 122/89); see also *infra* notes 275–87 and accompanying text. Although the citation is omitted from the Third Circuit's opinion, Justice John Waite in *In re Bates* was actually referring to Lord Leslie Scarman's

residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective."<sup>173</sup> This articulation of "settled purpose" as influenced by *Bates* focuses on the parents' current shared intentions regarding their child's presence in that country, as well as the child's experiences in his or her country of habitual residence.<sup>174</sup>

The Third Circuit then applied its standard to determine Evan's habitual residence immediately prior to his alleged wrongful retention.<sup>175</sup> The court looked first to Evan's "circumstances." Evan had been in Australia for six months, which the court deemed a considerable amount of time given his age, and was enrolled in preschool and kindergarten in Australia, activities that the court considered central to a child's life.<sup>176</sup> The court then looked at the Feders' "shared intentions" regarding Evan. The court recognized that the Feders had agreed to move to Australia as a family with the intention of making a new home for themselves.<sup>177</sup> Accordingly, it decided that Mrs. Feder's intent not to remain in Australia could not override the objective factual evidence or prior shared intentions indicative of a settled purpose to stay in Australia.<sup>178</sup> Thus, the Third Circuit concluded that Evan's habitual residence was Australia.<sup>179</sup>

## 2. Ninth Circuit: *Mozes v. Mozes*

Six years after the Third Circuit addressed the issue of habitual residence in *Feder*, the Ninth Circuit heard the case of *Mozes v. Mozes*.<sup>180</sup> Arnon and Michal were married in 1982 in Israel and had four children.<sup>181</sup> The family remained together in Israel until 1997, when Michal decided to move the children to Los Angeles.<sup>182</sup> Although Arnon remained in Israel, he gave his consent for the move, paid for their home and car in Los Angeles, and occasionally visited the family there.<sup>183</sup> A year after arriving in the United States, Michal filed for a dissolution of the marriage and custody of the

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opinion from *Regina v. Barnet London Borough Council*, [1983] 2 A.C. 309, 343 (H.L. 1982) (appeal taken from Eng.) (U.K.).

173. *Feder*, 63 F.3d at 224; see also Michelle Morgan Kelly, Note, *Taking Liberties: The Third Circuit Defines "Habitual Residence" Under the Hague Convention on International Child Abduction*, 41 VILL. L. REV. 1069, 1080-81 (1996) (discussing the Third Circuit's reliance on *Bates* and *Friedrich* in developing its definition of habitual residence).

174. *Feder*, 63 F.3d at 224.

175. *Id.*

176. *Id.*; see also BEAUMONT & MCELEAVY, *supra* note 35, at 106; *infra* app.

177. *Feder*, 63 F.3d at 224; see also *infra* app.

178. *Feder*, 63 F.3d at 224.

179. *Id.* at 225.

180. 239 F.3d 1067 (9th Cir. 2001).

181. *Id.* at 1069.

182. *Id.*

183. *Id.*



children.<sup>184</sup> Arnon commenced an action under the Child Abduction Convention seeking to have the children returned to Israel.<sup>185</sup>

Recognizing that habitual residence is “the central—often outcome-determinative—concept on which the entire system is founded,” the Ninth Circuit began its analysis by considering the relevance of intent.<sup>186</sup> The court acknowledged that “simple observation” of a child would be the most straightforward way to determine his or her habitual residence.<sup>187</sup> However, the Ninth Circuit rejected this straightforward approach as having a fatal flaw.<sup>188</sup> It argued that observation could yield different results based on the observer’s time frame and that such impreciseness is unavoidable because it is impossible to determine the duration necessary for adequate observation.<sup>189</sup>

The Ninth Circuit concluded that close attention must be paid to subjective intent.<sup>190</sup> The Ninth Circuit found support for its reliance on subjective intent in Lord Leslie Scarman’s discussion of settled purpose in another British case, *Regina v. Barnet London Borough Council*.<sup>191</sup> There, Lord Scarman stated, “[a]ll that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.”<sup>192</sup> The Ninth Circuit agreed that being habitually resident in a place must mean that a person is settled, but deemed the concept of settled purpose alone insufficient to determine a child’s habitual residence.<sup>193</sup> In order for a person to acquire a new habitual residence, some intention to abandon the current residence must also be present.<sup>194</sup>

With the concept of intent as the bedrock of its habitual residence determination, the Ninth Circuit then contemplated *whose* intent must be considered.<sup>195</sup> The court again acknowledged that the obvious answer would be the child’s, because it is the child’s habitual residence that the court must determine.<sup>196</sup> However, the Ninth Circuit found that children (in general and particularly those subjected to Child Abduction Convention proceedings) “normally lack the material and psychological wherewithal to decide where they will reside.”<sup>197</sup> Thus, it is the intent of the person or

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184. *Id.*

185. *Id.* Arnon and Michal Mozes’s eldest child elected to return to Israel and did so by mutual agreement, so the U.S. Court of Appeals for the Ninth Circuit considered only the habitual residence of the three youngest children. *Id.*

186. *Id.* at 1072–73.

187. *Id.* at 1073–74 (“Under this approach, we might say that if we observe someone centering his life around a particular location during a given period, so that every time he goes away from it he also comes back, we will call this his habitual residence.”).

188. *Id.* at 1074.

189. *Id.* (quoting *Adderson v. Adderson*, [1987] 51 Alta. L.R.2d 193, 198 (Can.)).

190. *Id.*

191. [1983] 2 A.C. 309, 343 (H.L. 1982) (appeal taken from Eng.) (U.K.).

192. *Mozes*, 239 F.3d at 1074 (quoting *Regina*, [1983] 2 A.C. at 344).

193. *Id.*

194. *Id.* at 1075.

195. *Id.* at 1076.

196. *Id.*

197. *Id.*

persons entitled to fix the child's place of residence—usually the parents—that must be taken into account.<sup>198</sup> The court, however, recognized that this is difficult where, as in most Child Abduction Convention proceedings, these parties are estranged and unlikely to agree on anything.<sup>199</sup> The Ninth Circuit found the most difficult situations to be the in-between cases where one parent consented to let a child stay abroad for an indefinite duration.<sup>200</sup> It is in these cases that all available evidence must be considered to determine whether the parents intended to change the child's habitual residence.<sup>201</sup>

After determining that it is the parents' shared subjective intent that is relevant to a determination of habitual residence, the Ninth Circuit addressed, when, if at all, the child's objective circumstances should be considered.<sup>202</sup> The court recognized that a change in habitual residence cannot be accomplished by wishful thinking and that an actual change in geography and the passage of an appreciable amount of time sufficient for acclimatization is required.<sup>203</sup> The Ninth Circuit questioned if and when evidence of acclimatization could establish a child's habitual residence, even with contrary parental intent.<sup>204</sup> Although focusing on a child's contacts with a new country is a more straightforward and objective approach that would enable courts to avoid taking a child from his or her familiar surroundings, the Ninth Circuit deemed these reasons to have only a "superficial appeal."<sup>205</sup> The court found that the Child Abduction Convention was designed to reduce the incentive to seek unilateral custody over a child and any standard that would make it easier to shift habitual residence without the consent of both parents would act contrary to that goal.<sup>206</sup> The court rejected a reliance on acclimatization and reasoned that children are adaptable and able to form intense attachments in a short amount of time.<sup>207</sup> The Ninth Circuit emphasized a focus on subjective

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198. *Id.* (citing *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995); *In re Application of Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993); E. M. Clive, *The Concept of Habitual Residence*, 1997 JURID. REV. 137, 144–45).

199. *Id.*

200. *Id.* at 1077. The Ninth Circuit considered the other two broad categories of Child Abduction Convention cases much easier to decide. In the first category, where a family is deemed to have "jointly taken all the steps associated with abandoning habitual residence in one country to take it up in another," a shared intent to move is usually found. *Id.* at 1076–77. In the second category, where a child is allowed by one parent to abandon an established habitual residence in favor of another for a specified time period, courts rarely find that a child's habitual residence has changed based on a change in a parent's intent. *Id.* at 1077.

201. *Id.* at 1076.

202. *Id.* at 1078.

203. *Id.*

204. *Id.* The court determined that, given enough time, a child may become acclimatized to the new country so that habitual residence may be established despite parental intent to the contrary. *Id.*

205. *Id.* at 1078–79.

206. *Id.* at 1079; see also Silberman, *supra* note 22, at 1065 ("Requiring a clear showing that a 'new' residence has been acquired reduces the ease with which habitual residence may be shifted . . .").

207. *Mozes*, 239 F.3d at 1079.

intent and discouraged reliance on objective facts, except where they “point unequivocally to a person’s ordinary or habitual residence being in a particular place.”<sup>208</sup> It concluded that, absent parental intent, courts should be slow to infer from objective evidence that an earlier habitual residence has been abandoned.<sup>209</sup>

The Ninth Circuit then applied its newly articulated standard to the facts. It held that, in order to infer a shared intent to abandon a previous habitual residence, the agreement between the parents and the circumstances surrounding it must be clear on the matter.<sup>210</sup> However, the record lacked a sufficient showing of shared parental intent to abandon Israel as the children’s habitual residence.<sup>211</sup> While the objective evidence showed that the children had spent a “very full year” in Los Angeles, it did not unequivocally show that Israel had ceased to be the children’s habitual residence.<sup>212</sup> The Ninth Circuit concluded that the district court had given insufficient weight to the importance of shared parental intent and deemed the appropriate inquiry to be “whether the United States had supplanted Israel as the locus of the children’s family and social development.”<sup>213</sup>

### 3. The Other Circuits Apply the *Feder* and *Mozes* Standards

The body of case law surrounding the concept of habitual residence grew exponentially in the years between the Third Circuit’s decision in *Feder* and the Ninth Circuit’s decision in *Mozes* and has grown even more in subsequent years.<sup>214</sup> Nearly every circuit to consider the issue of habitual residence has incorporated, in some fashion, the parents’ shared intention as a factor for analysis.<sup>215</sup>

In 2003, the Eighth Circuit considered the issue of habitual residence in *Silverman v. Silverman*. The Silverman family moved from Minnesota to Israel in 1999 with their seven-year-old son, Sam, and four-year-old son, Jacob.<sup>216</sup> After a strained year in Israel, Julie Silverman returned to the United States with the boys under the pretense of a two-month summer

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208. *Id.* at 1081 (quoting *Zenel v. Haddow* [1993] S.C. 612, 617 (Scot.)).

209. *Id.* at 1079; *see also* Silberman, *supra* note 22, at 1065 (discussing the Third Circuit’s opinion that, “in these international parental abduction cases, courts should be slow to infer that an earlier habitual residence had been abandoned”).

210. *Mozes*, 239 F.3d at 1081.

211. *Id.* at 1083.

212. *Id.* (quoting *Mozes v. Mozes*, 19 F. Supp. 2d 1108, 1116 (C.D. Cal. 1998)); *see also infra app.*

213. *Mozes*, 239 F.3d at 1084. The Ninth Circuit remanded the case to the U.S. District Court for the Central District of California for consideration of this issue. *Id.*

214. *See* Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 276–77 (2002) (discussing the three hundred percent increase in decisions released from 1993 to 2001).

215. *See, e.g., Koch v. Koch*, 450 F.3d 703, 714–15 (7th Cir. 2006) (stating that “virtually every circuit court to consider the issue of habitual residence since *Mozes* has adopted some variation of its approach” and finding “no reason to disavow the *Mozes* approach”).

216. *Silverman v. Silverman*, 338 F.3d 886, 889 (8th Cir. 2008).

vacation.<sup>217</sup> In late 2000, Robert Silverman filed Child Abduction Convention petitions in an Israeli court and in the district court in Minnesota.<sup>218</sup> The Israeli court ruled that Israel was the boys' habitual residence; in contrast, the district court ruled that Minnesota was the boys' habitual residence.<sup>219</sup> The Eighth Circuit looked to the rulings of *Friedrich*, *Feder*, and *Mozes* in considering the issue of the boys' habitual residence.<sup>220</sup> Reversing the district court's ruling and finding that the boys' habitual residence was Israel, the Eighth Circuit emphasized

the degree of settled purpose from the children's perspective, including the family's change in geography along with their personal possessions and pets, the passage of time, the family abandoning its prior residence and selling the house, the application for and securing of benefits only available to Israeli immigrants, the children's enrollment in school, and, to some degree, both parents' intentions at the time of the move to Israel.<sup>221</sup>

The dissent found this result unsatisfying and inconsistent with the holding of *Mozes*.<sup>222</sup> Emphasizing that it is the parents' shared intent that must be considered, Judge Gerald Heaney agreed with the district court's determination that the Silvermans did not have a shared intention to abandon Minnesota for Israel.<sup>223</sup>

Just over a year later, the Eleventh Circuit considered the issue of habitual residence in *Ruiz v. Tenorio*.<sup>224</sup> Melissa Tenorio and Juan Tenorio Ruiz met in 1992 while Melissa was an exchange student in Mexico.<sup>225</sup> Melissa returned to Minnesota and their first son, Juanito, was born in December 1992.<sup>226</sup> Juan joined Melissa in Minnesota after he graduated high school; they subsequently married, and their second son, Javier, was born in 1998.<sup>227</sup> The couple moved to Mexico in August 2000 so that Juan could work for his family business.<sup>228</sup> Tensions developed between Melissa and her in-laws that further exacerbated her already strained marriage, and, on May 20, 2003, Melissa took the boys to Florida without any intention of returning to Mexico.<sup>229</sup> Juan filed a petition under the Child Abduction Convention in a Florida federal district court on July 29, 2003.<sup>230</sup> In considering the issue of Juanito and Javier's habitual residence,

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217. *Id.* at 890.

218. *Id.* at 891.

219. *Id.* at 891-93; *see also* Silverman v. Silverman, No. CIV. 00-2274, 2002 WL 971808, at \*4, \*6 (D. Minn. May 9, 2002).

220. *Id.* at 898-99.

221. *Id.* (footnote omitted); *see also infra* app.

222. *Silverman*, 338 F.3d at 902 (Heaney, J., dissenting).

223. *Id.* at 905-06.

224. 392 F.3d 1247 (11th Cir. 2004).

225. *Id.* at 1249.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 1249-50.

230. *Id.* at 1250.

the Eleventh Circuit found the *Mozes* approach to be the most appropriate.<sup>231</sup> Thus, the first step in its analysis was to determine the parents' shared intentions.<sup>232</sup> The Eleventh Circuit found that this case fell in the most difficult of the *Mozes* categories<sup>233</sup> and that Juan had failed to show that he and Melissa had had a shared intention to abandon the United States as the children's habitual residence.<sup>234</sup> However, the court then looked at the objective facts of the case, since "the absence of a shared and settled intention by the parents to abandon the previous United States habitual residence of the children is not dispositive."<sup>235</sup> Although the Eleventh Circuit recognized that there was evidence that the children had acclimatized during their nearly three years in Mexico, the court also found evidence that the move to Mexico was conditional.<sup>236</sup> Ultimately, the Eleventh Circuit determined the objective facts to be insufficient to show that the children's habitual residence had ever ceased being the United States and that a new habitual residence in Mexico had been established.<sup>237</sup>

In 2005, the Second Circuit added to the rapidly developing body of case law when it decided *Gitter v. Gitter*.<sup>238</sup> Miriam, an Israeli-born American citizen, and Yoshi, an Israeli citizen, met and married in 1999; their son, Eden, was born in December 2000.<sup>239</sup> Shortly after Eden's birth, Yoshi proposed moving to Israel; the family moved in March 2001.<sup>240</sup> Eleven months after their move, Miriam returned to New York with Eden to visit her sister; when Yoshi joined them, she expressed her desire to remain in the United States.<sup>241</sup> Yoshi convinced her to return to Israel for a short time, but on June 30, 2002, Miriam permanently returned to the United States with Eden.<sup>242</sup> Yoshi filed a petition under the Child Abduction Convention in the U.S. District Court for the Eastern District of New York in July 2003.<sup>243</sup> In determining the issue of Eden's habitual residence, the Second Circuit found the Ninth Circuit's holding in *Mozes* particularly instructive.<sup>244</sup> The court found that "[f]ocusing on intentions gives contour to the objective, factual circumstances surrounding the child's presence in a

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231. *Id.* at 1252.

232. *Id.* at 1252–53.

233. *See id.* at 1254 (citing *Mozes v. Mozes*, 239 F.3d 1067, 1077 (9th Cir. 2001)); *supra* note 200 and accompanying text.

234. *Ruiz*, 392 F.3d at 1254; *see also* Silberman, *supra* note 22, at 1066 (discussing the district court's findings that Melissa had moved to Mexico as a "trial period" to save her marriage and that Juan had had second thoughts about moving).

235. *Ruiz*, 392 F.3d at 1255; *see also infra* app.

236. *Ruiz*, 392 F.3d at 1255.

237. *Id.* at 1256; *see also* Silberman, *supra* note 22, at 1066 (highlighting the Eleventh Circuit's greater emphasis on the intentions of the parties).

238. 396 F.3d 124 (2d Cir. 2005).

239. *Id.* at 128.

240. *Id.*

241. *Id.* at 128–29.

242. *Id.* at 129.

243. *Id.*

244. *Id.* at 131 (remarking that the "primary insight of *Mozes* is its recognition of the importance of intentions (normally the shared intentions of the parents or others entitled to fix the child's residence) in determining a child's habitual residence").

given location.”<sup>245</sup> The Second Circuit advocated looking at the parents’ intentions at the last time their intentions were shared.<sup>246</sup> In a perfunctory application of its standard to the facts of the case, the Second Circuit determined simply that there was no settled mutual intent to abandon the United States in favor of Israel as Eden’s habitual residence.<sup>247</sup>

### B. *The Sixth Circuit Approach: Objective Evidence*

As two of the earliest and most comprehensive opinions on the issue of habitual residence, the Third Circuit’s holding in *Feder* and the Ninth Circuit’s holding in *Mozes* have been extremely influential for other circuits faced with Child Abduction Convention proceedings.<sup>248</sup> The Sixth Circuit’s decision in *Friedrich*, with its resolute insistence against relying on shared parental intent, had been forgotten.<sup>249</sup> Yet six years after *Mozes*, the Sixth Circuit was again presented with a habitual residence determination.<sup>250</sup> Rather than follow the Third and Ninth Circuits, the Sixth Circuit persisted in its view and was the first circuit to challenge the propriety of considering shared parental intent in determining a child’s habitual residence.<sup>251</sup>

#### 1. *Robert v. Tesson*

The basic facts of *Robert* are quite similar to those of *Feder* and *Mozes*. Ivan Robert and Gayle Tesson met in Houston, Texas, in 1994 and married two years later.<sup>252</sup> They had twin boys, Thomas and Alexis, in 1997, and resided in the Houston area.<sup>253</sup> In 1998, the couple formed a French company and purchased property in France.<sup>254</sup> From 1998 until 2003, when Gayle and the twins left France for the United States, the family split their time between the two countries.<sup>255</sup> In 2005, Ivan commenced an action pursuant to the Child Abduction Convention and ICARA alleging that Gayle had wrongfully removed the twins from France.<sup>256</sup>

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245. *Id.* at 132.

246. *Id.* at 133; see also Carshae DeAnn Davis, Note, *The Gitter Standard: Creating a Uniform Definition of Habitual Residence Under the Hague Convention on the Civil Aspects of International Child Abduction*, 7 CHI. J. INT’L L. 321, 328 (2006) (finding that the Second Circuit’s inquiry into the parents’ shared intentions was a means of satisfying the intent requirement of *Mozes*).

247. *Gitter*, 396 F.3d at 135–36; see also *infra* app. The U.S. Court of Appeals for the Second Circuit remanded the case to the district court to determine whether the facts were sufficient for a finding that Israel was Eden Gitter’s habitual residence. *Gitter*, 396 F.3d at 136.

248. See *supra* Part II.A.3.

249. See *supra* notes 148–53 and accompanying text.

250. *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007).

251. *Id.* at 998 (recognizing that the holding “places [the Sixth Circuit] at odds with the Ninth Circuit’s decision in *Mozes*”).

252. *Id.* at 984.

253. *Id.*

254. *Id.*

255. *Id.* at 984–86.

256. *Id.* at 987.

While nearly every other circuit had to consider the issue of habitual residence as a matter of first impression, the Sixth Circuit had *Friedrich* as precedent.<sup>257</sup> The Sixth Circuit relied on *Friedrich*'s five guiding principles.<sup>258</sup> First, courts should focus on the facts and circumstances of each case, rather than rely on technical rules; second, courts should refrain from considering anything other than the child's experiences; third, the inquiry should be limited to the child's *past* experiences; fourth, a person can have only one habitual residence at any time; and fifth, the nationality of the child's caregiver is not indicative of the child's habitual residence.<sup>259</sup> The Sixth Circuit went on to analyze the decisions of other circuits, particularly the Third and Ninth Circuits, and found that they had parted ways with *Friedrich* by including the parents' subjective intent as an additional factor for consideration.<sup>260</sup> The court was especially critical of the Ninth Circuit's decision in *Mozes*, finding that it was not only inconsistent with *Friedrich*, but "'made seemingly easy cases hard and reached results that are questionable at best.'"<sup>261</sup> For the Sixth Circuit, this was exemplified in the Eleventh Circuit's application of the *Mozes* standard in *Ruiz*.<sup>262</sup> Despite the objective factual evidence showing that the children had established a new habitual residence in Mexico, the Eleventh Circuit had found that the evidence was outweighed by the lack of shared parental intent to abandon the United States as the children's habitual residence.<sup>263</sup> The Sixth Circuit criticized this standard as running counter to the Child Abduction Convention's goal of preventing the removal of a child from the environment in which his or her life has developed.<sup>264</sup> The Sixth Circuit found that the *Mozes* standard allowed children to be returned to their previous habitual residences simply because one parent voiced reservations about the move to a new habitual residence and declined to follow such a rule.<sup>265</sup> The Sixth Circuit was, however, receptive to part of the Third Circuit's reasoning in *Feder*.<sup>266</sup> Recognizing the goals of the Child Abduction Convention, the influence of the *Feder* test, and its own

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257. *Id.* at 988 ("[O]ur inquiry must begin with our sole precedent on this issue."). *But see, e.g.,* *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001) ("In a case of first impression in our court, we interpret the term 'habitual residence' in the Hague Convention on the Civil Aspects of International Child Abduction.").

258. *Robert*, 507 F.3d at 989.

259. *Id.* (citing *Friedrich v. Friedrich* (*Friedrich I*), 983 F.2d 1396, 1401 (6th Cir. 1993); *In re Bates*, (1989) CA 122/89, slip op. (High Ct. of Justice, Fam. Div., Royal Cts. of Justice), [http://www.hiltonhouse.com/cases/Bates\\_uk.txt](http://www.hiltonhouse.com/cases/Bates_uk.txt)); *see also supra* Part I.E; *infra* notes 275–87 and accompanying text.

260. *Robert*, 507 F.3d at 989; *see also supra* Part II.A.1–2.

261. *Robert*, 507 F.3d at 991 (quoting *Koch v. Koch*, 416 F. Supp. 2d 645, 651 (E.D. Wis. 2006)).

262. *Id.*; *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004); *see also supra* notes 224–37 and accompanying text.

263. *Robert*, 507 F.3d at 991; *Ruiz*, 392 F.3d at 1254; *see also supra* notes 232–37 and accompanying text.

264. *Robert*, 507 F.3d at 991 (quoting *Pérez-Vera Report*, *supra* note 36, at 429).

265. *Id.* at 991–92.

266. *Id.* at 992–93 (finding that "not all post-*Friedrich I* developments should be rejected"); *see also supra* notes 173–74 and accompanying text.

precedent, the Sixth Circuit held that "a child's habitual residence is the nation where, at the time of their removal, the child has been present long enough to allow acclimatization, and where this presence has a 'degree of settled purpose from the child's perspective.'"<sup>267</sup>

The Sixth Circuit applied its standard to the facts before it and found that, while many of the facts "cut in both directions," the evidence demonstrated that the boys were habitual residents of the United States at the time they were removed from France by their mother.<sup>268</sup> The Sixth Circuit noted that, during their time in the United States, Thomas and Alexis attended American schools, developed meaningful relationships with their maternal relatives, and went on vacations to Yellowstone National Park and Baton Rouge.<sup>269</sup> This contrasted sharply with their experiences in France.<sup>270</sup> While in France, Thomas and Alexis had barely any contact with their father or their other paternal relatives and their "home," Mas Verdoline, was in no condition for children to live.<sup>271</sup>

### C. *The Foreign Courts Weigh In: A Brief Survey*

As discussed earlier in this Note, one of the Child Abduction Convention's goals is uniform interpretation and application of its text worldwide.<sup>272</sup> Both the Vienna Convention and the Supreme Court have advocated considering the decisions of the United States' sister signatories as a method of attaining this goal.<sup>273</sup> However, American courts have selectively referenced only a few foreign cases in their opinions, almost exclusively from Britain and other common-law countries.<sup>274</sup> Given the importance of uniform interpretation of the Child Abduction Convention, this part seeks to provide a complete examination of the habitual residence determination by surveying Child Abduction Convention cases from both common-law and civil-law countries. Part II.C.1 considers cases from common-law countries whose courts, like the Third and Ninth Circuits, advocate, to differing extents, some reliance on subjective intent when determining a child's habitual residence. Part II.C.2 considers cases from

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267. *Id.* at 993 (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995)) (describing this standard as consistent with the goal of the Child Abduction Convention to protect the rights of children not to have their lives altered absent a guarantee of stability in a new environment and with the holding of *Friedrich* that "a habitual residence inquiry must 'focus on the child, not the parents, and examine past experience, not future intentions'" (quoting *Friedrich v. Friedrich* (*Friedrich I*), 983 F.2d 1396, 1401 (6th Cir. 1993))).

268. *Id.* at 996; *see also infra* app.

269. *Robert*, 507 F.3d at 996-97; *see also infra* app.

270. *Robert*, 507 F.3d at 997; *see also infra* app.

271. *Robert*, 507 F.3d at 997.

272. *See supra* Part I.B.1.

273. *See supra* Part I.D.

274. *See, e.g., Robert*, 507 F.3d at 989 (citing *In re Bates*, (1989) CA 122/89, slip op. (High Ct. of Justice, Fam. Div., Royal Cts. of Justice) (U.K.), [http://www.hiltonhouse.com/cases/Bates\\_uk.txt](http://www.hiltonhouse.com/cases/Bates_uk.txt)); *Mozes v. Mozes*, 239 F.3d 1067, 1074, 1081 (9th Cir. 2001); *see also* BEAUMONT & MCELEAVY, *supra* note 35, at 236 (noting that courts in the United States have chosen, in accordance with the decision of the Supreme Court in *Air France v. Saks*, to consult foreign case law).



civil-law countries, whose courts, like the Sixth Circuit, generally advocate limiting the habitual residence determination to the objective facts presented.

### 1. Common-Law Subjectivity

One of the most cited common-law cases in both the United States and other common-law countries is the British case, *In re Bates*.<sup>275</sup> Decided in 1989, *Bates* was one of the earliest cases to consider the issue of habitual residence under the Child Abduction Convention. Tatjana, born in 1986, was the only daughter of an American mother and British father who were married in 1984.<sup>276</sup> Because of the father's success as a pop musician, the family travelled constantly and Tatjana was left mostly to the care of nannies.<sup>277</sup> Despite an earlier disagreement over where the mother, Tatjana, and Tatjana's nanny would remain while the father embarked on his most recent world tour, it was decided that they would remain in New York.<sup>278</sup> Soon after the father's departure, Tatjana's mother, desiring to devote more time to Tatjana's day-to-day care, gave her nanny the weekend off.<sup>279</sup> Finding this to be a threat to Tatjana's father's arrangements, the nanny contacted him and was instructed to take Tatjana to London immediately.<sup>280</sup> Tatjana's mother immediately contacted both the American and British central authorities and filed simultaneous Child Abduction Convention petitions in American and British courts.<sup>281</sup>

In his opinion, Justice John Waite relied heavily on two sources of British law: *Dicey and Morris on the Conflict of Laws* and Lord Scarman's opinion in *Regina v. Barnet London Borough Council*.<sup>282</sup> Justice Waite recognized that habitual residence was intended by the Child Abduction Convention drafters to be a concept separate from domicile and that courts should avoid creating detailed and restrictive rules that would transform it into a technical term of art.<sup>283</sup> Justice Waite then adopted the principle of "settled purpose" from Lord Scarman's opinion in *Regina*:

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275. See BEAUMONT & MCELEAVY, *supra* note 35, at 236 (discussing the fact that *Bates* is the starting point for many courts considering habitual residence, as well as the fact that, despite English and Scottish reluctance to rely on foreign case law, courts in Australia and New Zealand have made extensive use of such decisions, particularly those from England).

276. *In re Bates*, (1989) CA 122/89 (High Ct. of Justice, Fam. Div., Royal Cts. of Justice).

277. *Id.*

278. *Id.* Tatjana's father wanted them to wait for him in their London home, whereas Tatjana's mother wished to remain in New York. *Id.*

279. *Id.*

280. *Id.* Tatjana Bates's father felt that the nanny was "essential to look after his interest, to maintain surveillance and to report back to him. He told [the nanny] privately that if the mother was . . . 'mean' to her, she was to report to him straight away." *Id.*

281. *Id.*

282. *Id.* (citing *Regina v. Barnet London Borough Council*, [1983] 2 A.C. 309, 343 (H.L. 1982) (appeal taken from Eng.) (U.K.); A. V. DICEY & J. H. C. MORRIS, 1 DICEY & MORRIS ON THE CONFLICT OF LAWS ch. 7 (Lawrence Collins ed., 11th ed. 1987)).

283. *Id.* (quoting DICEY & MORRIS, *supra* note 282, at 167).

[T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.<sup>284</sup>

He determined that, while it is the child's habitual residence that must be determined, when a child is as young as Tatjana the "overtly stated intentions" of the child's parents are bound to be important factors and must be included.<sup>285</sup> In applying these principles to the facts before him, Justice Waite determined that the New York apartment was intended to be a temporary base, but that it had acquired a more settled purpose by the time the family moved in, evidenced by the arrangements made for Tatjana's care, accommodations, and speech therapy.<sup>286</sup> Justice Waite concluded that New York was Tatjana's habitual residence and her removal to London was wrongful under the Child Abduction Convention.<sup>287</sup> Every subsequent Child Abduction Convention case that has come before a British court has been determined according to the principles laid out in *Bates*.<sup>288</sup>

Relying on British case law, courts in other common-law countries have come to similar conclusions in considering habitual residence. One such example is the 1990 Scottish case, *Dickson v. Dickson*.<sup>289</sup> Penny and James Dickson married in 1987, and their only son was born in 1988.<sup>290</sup> A year after their child's birth, the family left Scotland for Australia.<sup>291</sup> After only a few discontented months in Australia, James returned to England with their son.<sup>292</sup> The parties disputed whether this return was intended to be a vacation or permanent.<sup>293</sup> Regardless, Penny waited another three months

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284. *Id.* (quoting *Regina*, [1983] 2 A.C. at 344). It must be noted, first, that *Regina v. Barnet London Borough Council* was not a Child Abduction Convention case, but rather a case deciding the "ordinary residence" of immigrants with respect to the British Education Act, and, second, that Lord Leslie Scarman equated the concept of habitual residence with "ordinary residence," a development that has been subject to great criticism. See BEAUMONT & MCELEAVY, *supra* note 35, at 101 n.81; see also *supra* notes 108-10 and accompanying text.

285. *Bates*, (1989) CA 122/89.

286. *Id.*; see also *infra* app.

287. *Bates*, (1989) CA 122/89.

288. See, e.g., *B v. H*, [2002] 1 F.L.R. 388 (Fam.) (U.K.); *In re J*, [1990] 2 A.C. 562 (H.L.) (appeal taken from Eng.) (U.K.), *aff'd sub nom.* *C v. S*, [1990] 2 All E.R. 961 (H.L.) (appeal taken from Eng.) (U.K.).

289. [1990] Sc. L.R. 692 (Sess.) (Scot.).

290. *Id.* at 693.

291. *Id.*

292. *Id.* After spending some time at his sister's home in England, James Dickson returned with the child to Scotland. *Id.*

293. *Id.* at 694-96.

before claiming that James had wrongfully removed their son.<sup>294</sup> The court determined that habitual residence "implied residence over an extended period and settled in quality."<sup>295</sup> However, since a two-year-old child is unable to form his or her own intention about residence in the same way an adult can, only the child's parents can decide his or her residence.<sup>296</sup> The court ultimately concluded that when the child left Australia it was James's intention that they never return and, until Penny filed her claim, both parents expected the child to make his home in the United Kingdom, and "it could not be said that the child resided in Australia."<sup>297</sup>

In *Cooper v. Casey*,<sup>298</sup> the Family Court of Australia came to a similar conclusion on the issue of habitual residence. The parents of B and H married in September 1988; B and H were both born in Australia.<sup>299</sup> Shortly after B's birth in 1989, the family left Australia for the United States and made frequent trips back to Australia over the next five years.<sup>300</sup> In 1993, the wife, with her husband's consent, left for France with B and H and purchased a home there.<sup>301</sup> She eventually returned to the United States with the children in February 1994.<sup>302</sup> However, she remained there only six months before leaving for Australia with the children.<sup>303</sup> In considering the issue of B and H's habitual residence, the court looked to a combination of American and British case law.<sup>304</sup> The court recognized the principles laid out by Justice Waite in *In re B*:<sup>305</sup> first, that a young child's habitual residence is the same as that of his or her parents and neither parent can unilaterally change it without the other parent's consent, and second, that the habitual residence of a married couple is the county that the couple has voluntarily adopted for settled purposes as part of their regular lives.<sup>306</sup> Perfunctorily addressing the issue, the court merely affirmed the lower court's determination that, having settled in the United States after their return from France in 1984, B and H's habitual residence had never ceased to be the United States.<sup>307</sup>

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294. *Id.* at 693.

295. *Id.* at 699 (quoting *Kapur v. Kapur*, [1984] F.L.R. 920, 926 (Fam.) (U.K.)); see also BEAUMONT & MCELEAVY, *supra* note 35, at 101 ("[T]he Lord President stated that a habitual residence was: '... one which is being enjoyed voluntarily for the time being and with the settled intention that it should continue for some time.'" (quoting *Dickson* [1990] Sc. L.R. at 703)).

296. *Dickson* [1990] Sc. L.R. at 699.

297. *Id.* at 699–700; see also *infra* app. The court made no distinction between England and Scotland, finding the United Kingdom the child's habitual residence. *Dickson* [1990] Sc. L.R. at 699–700.

298. (1995) 18 Fam. L.R. 433 (Austl.).

299. *Id.* at 434.

300. *Id.* H was born on one of those visits to Australia. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 435–36 (citing *Friedrich v. Friedrich (Friedrich I)*, 983 F.2d 1396, 1401 (6th Cir. 1993); *In re B*, [1993] 1 F.L.R. 993 (Fam.) (U.K.)).

305. [1993] 1 F.L.R. 993.

306. *Cooper*, (1995) 18 Fam. L.R. at 435–36 (quoting *In re B*, [1993] 1 F.L.R. at 995).

307. *Id.*; see also *infra* app.

## 2. Civil-Law Objectivity

Like their common-law counterparts, courts in civil-law countries have been called upon to consider the issue of habitual residence under the Child Abduction Convention. Civil-law courts have distinguished themselves from common-law courts by refusing to rely on subjective intent when determining a child's habitual residence. Despite the availability of civil-law opinions, few common-law courts have chosen to look to these courts for guidance. If uniformity in interpretation is to be achieved, there is no reason to prefer common-law cases over civil-law cases as a source of guidance.

In 1995, the Argentine Supreme Court of Justice was presented with a Child Abduction Convention case in *Wilner v. Osswald*.<sup>308</sup> Eduardo Wilner and María Osswald married in Buenos Aires in 1985 and a few months later left for Canada, where Eduardo was to study at a university.<sup>309</sup> Their daughter was born in Ontario in February 1990.<sup>310</sup> The family remained in Canada until 1993, when María decided to return to Buenos Aires with their daughter to spend the holidays with her family.<sup>311</sup> It was not until the passage of the new year that Eduardo realized that María had decided to remain in Argentina with their daughter.<sup>312</sup> Eduardo then petitioned for his daughter's return under the Child Abduction Convention.<sup>313</sup> In determining what the daughter's habitual residence was, Argentina's highest court succinctly stated that "[t]he term 'habitual residence' as used in the [Child Abduction] Convention refers to a factual situation that implies stability and permanence and alludes to the center of the minor's life, excluding any reference to minors' depending domicile."<sup>314</sup> The court concluded that any interpretation that made a child's habitual residence dependent on the parents' domicile is mistaken.<sup>315</sup> Based on the fact that the child had developed her life in Ontario, which was where her family was and where

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308. Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Justice], 14/6/1995, "*Wilner, Eduardo Mario v. Osswald, María Gabriela / recurso de hecho*," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1995-318-1269) (Arg.), translated and available at <http://web.archive.org/web/20070526143121/http://www.hcch.net/incadat/fullcase/0362.htm>.

309. *Id.* at 1281-82.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 1285; see also Juzgado de Primera Instancia [1a Inst.] [Buenos Aires National Court of First Instance], 05/10/2001, "*Aisemberg de Altheim, Andrea F. v. Altheim, Flavio David*," (Arg.), translated and available at [http://hiltonhouse.com/cases/Altheim\\_Argentina.txt](http://hiltonhouse.com/cases/Altheim_Argentina.txt) ("[Habitual residence] therefore signifies the place where the minor carries out his activities, where he has been established with a certain degree of permanence, the centre of his emotional and daily experiences . . . the expression 'habitual residence' refers to a factual situation that assumes stability and permanence.").

315. *Wilner*, Fallos (1995-318) at 1285. Implicit in the court's rejection of the parents' domicile as a factor in determining habitual residence is a rejection of the parents' subjective intention. See *supra* text accompanying notes 104-05.

she attended kindergarten, the court determined that her habitual residence was Canada.<sup>316</sup>

In 1996, the Supreme Administrative Court of Sweden faced a similar determination in *Johnson v. Johnson*.<sup>317</sup> Anne and Thomas were married in 1986, and Amanda, their only daughter, was born in 1987.<sup>318</sup> In 1990, the family moved from Switzerland to the United States, where Anne was posted to the Swedish Consulate in New York and Thomas was posted in Washington, D.C.; Amanda lived alternately with her mother and father.<sup>319</sup> In 1992, Anne and Thomas divorced and agreed that Amanda would spend twenty-eight weeks with her mother and twenty-four weeks with her father until July 1, 1993, when Anne would return to Sweden with Amanda.<sup>320</sup> Amanda would then alternate between her parents every two years.<sup>321</sup> Prior to the date when Amanda was to return to Thomas in the United States, he filed a petition for her return under the Child Abduction Convention in a Swedish court.<sup>322</sup> In determining Amanda's habitual residence, the court found that habitual residence is where there is constancy with regard to the duration of the period concerned, among other factors.<sup>323</sup> Such an analysis must take into account all the circumstances that can be objectively observed to show a permanent attachment to one country over another, including the child's existing social ties.<sup>324</sup> In analyzing the objective facts, the court noted that Amanda had been staying with Anne in Sweden for more than two years prior to Thomas's petition and that the record showed that she had adjusted to her circumstances there.<sup>325</sup> In addition, the agreement between the parties stipulated that Amanda was to spend eight years in Sweden with Anne prior to reaching the age of eighteen, whereas she was to spend only four years in the United States with Thomas.<sup>326</sup> While Amanda had remained in Sweden against Thomas's will since August 1995, the date when physical custody was to switch, the retention was not wrongful because Sweden was Amanda's habitual residence.<sup>327</sup>

*Rochford v. Rochford*<sup>328</sup> presented the Juvenile Court of Rome with a habitual residence issue to consider in 1999. Luca was born in London on

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316. *Wilner*, Fallos (1995-318) at 1285; *see also infra app.*

317. Regeringsrätten [RegR] [Supreme Administrative Court] 1996-05-09 (Swed.), translated and available at [http://www.hiltonhouse.com/cases/Johnson\\_002\\_Sweden.txt](http://www.hiltonhouse.com/cases/Johnson_002_Sweden.txt).

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*; *see also* BEAUMONT & MCELEAVY, *supra* note 35, at 100 (discussing the parties' shuttle agreement, confirmed by the Alexandria Circuit Court in Virginia, whereby Amanda would alternate between Sweden and the United States).

322. *Johnson*, [RegR] 1996-05-09.

323. *Id.*

324. *Id.*

325. *Id.*; *see also infra app.*

326. *Johnson*, [RegR] 1996-05-09.

327. *Id.*

328. Juvenile Court of Rome, 07 jan. 1999, n.2450/98 E (Italy), translated and available at <http://web.archive.org/web/20050817001646/http://www.hcch.net/incadat/fullcase/0297.htm>.

August 5, 1993, to Nicholas, a British citizen, and Pasqualina, an Italian-British citizen.<sup>329</sup> The family lived together in England until Nicholas and Pasqualina separated and Pasqualina moved to Italy.<sup>330</sup> Luca remained exclusively in England, with the exception of a visit to his mother from September to December 1997, until Pasqualina removed him to Italy in May 1998.<sup>331</sup> In determining Luca's habitual residence, the court relied solely on the objective facts of the case. The court found that, except for his trip to Italy, Luca had lived in England all his life and that the trip was for so short a duration that it could not serve to change his habitual residence.<sup>332</sup> Only a place that is the center of the child's life and can be shown to be where the child usually spends most of his or her time can be considered the child's habitual residence.<sup>333</sup> The court found that Luca's habitual residence was unequivocally England.<sup>334</sup>

### III. RESOLVING THE DEBATE: COURTS SHOULD REFRAIN FROM INCORPORATING SUBJECTIVE INTENTIONS INTO THE HABITUAL RESIDENCE DETERMINATION

This Note has detailed the split between the U.S. circuits and among courts worldwide over what factors should be considered when determining a child's habitual residence. In the absence of any guidance from the text of the Child Abduction Convention, the circuits have developed differing standards based on divergent interpretations of what evidences a "degree of settled purpose."<sup>335</sup> The Third and Ninth Circuits have chosen to focus the analysis on the subjective intent of those charged with the child's care, usually the parents.<sup>336</sup> In contrast, the Sixth Circuit has limited its analysis to the objective facts of the case, finding this to be more in line with the Child Abduction Convention's goal of maintaining the status quo.<sup>337</sup> This division is also evident between courts in common-law and civil-law countries. Common-law courts, which the Ninth Circuit in particular has looked to for guidance, have, despite their best efforts, conflated the concepts of habitual residence and domicile.<sup>338</sup> As a result, common-law courts also advocate the incorporation of subjective intent into the habitual residence determination. Civil-law courts have exercised more restraint in limiting their analyses to objective facts.<sup>339</sup> This Note proposes that courts

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329. *Id.*

330. *Id.*

331. *Id.* Pasqualina Rochford argued that she intended to take Luca Rochford permanently to Italy when she left London in September 1997 and that Nicholas Rochford wrongfully retained Luca in London at the end of the Christmas holidays. *Id.*

332. *Id.*

333. *Id.* The court further noted that Luca did not even speak Italian when he arrived in Italy in September 1997. *Id.*; see also *infra* app.

334. *Rochford*, Juvenile Court of Rome, n.2450/98 E.

335. See *supra* notes 172-74, 191-94 and accompanying text.

336. See *supra* Part II.A.1-2.

337. See *supra* Part II.B.1.

338. See *supra* Part II.C.1.

339. See *supra* Part II.C.2.

in the United States, and indeed worldwide, should adopt the *Robert* standard and determine habitual residence solely on objective evidence of acclimatization. The Sixth Circuit's analysis best accomplishes the goals of the Child Abduction Convention's drafters and provides the certainty and consistency that the resolution of international child abduction cases requires.

Part III.A evaluates the standards advocated by the circuits as discussed in Part II by applying them to the facts of *Sorenson*. Part III.B proposes that the *Robert* standard is the better standard to apply in determining a child's habitual residence in order to remain faithful to the Child Abduction Convention's text and purpose.

A. *Evaluating the Application of the Circuits' Standards to the Facts of Sorenson v. Sorenson*

When the federal district court in Minnesota decided *Sorenson*, it was bound by the precedent laid out by the Eighth Circuit in *Silverman*, which in turn relied wholly on the reasoning of the Ninth Circuit in *Mozes*.<sup>340</sup> The district court thus looked first at the parents' shared subjective intentions and then to the objective evidence of E. S. S.'s acclimatization.<sup>341</sup> The district court found that the Sorensens' shared intent was to make Australia E. S. S.'s habitual residence and that they had no definite intention to return to the United States.<sup>342</sup> The district court found support for its conclusion in a number of objective facts, but gave "strong weight to these objective indications" simply because they substantiated the court's conclusion of the parents' intent.<sup>343</sup>

If the district court had applied the standard articulated in *Robert*—focusing the habitual residence determination solely on objective evidence of acclimatization—to the facts of *Sorenson*, it is probable that the court would have reached the same ultimate conclusion without the time-consuming inquiry into parental intent. The district court applying the *Robert* standard would have found that E. S. S. had lived in Australia for approximately three out of the five years of her life, but had lived in the United States for only fourteen months; that E. S. S. spoke English with an Australian accent because she had learned to speak English exclusively in Australia; that E. S. S. had enrolled in preschool in Australia; and that E. S. S.'s friends were all in Australia.<sup>344</sup> These objective facts clearly show that E. S. S.'s habitual residence was Australia.<sup>345</sup>

Although in this instance both standards yield the same result, if the district court had determined instead that the Sorensens' shared intent was to keep the United States as E. S. S.'s habitual residence, despite their

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340. See *supra* notes 216–23 and accompanying text.

341. See *supra* notes 16–19 and accompanying text.

342. See *Sorenson v. Sorenson*, 563 F. Supp. 2d 961, 964 (D. Minn. 2008).

343. See *supra* notes 18–20 and accompanying text.

344. See *Sorenson*, 563 F. Supp. 2d at 970; see also *infra* app.

345. See *Sorenson*, 563 F. Supp. 2d at 970.

temporary relocation to Australia, or that Eric had always shown an intention to return to the United States, the outcome could have been vastly different. Under the *Robert* standard, the objective evidence of acclimatization would still point toward Australia as being E. S. S.'s habitual residence at the time she was retained by Janea. In contrast, the *Feder* and *Mozes* standards place a greater emphasis on the parents' subjective intentions. The *Feder* standard requires an analysis of the child's "circumstances" in tandem with an emphasis on the parents' shared subjective intent;<sup>346</sup> the *Mozes* standard focuses much more heavily on the parents' shared subjective intentions, turning to objective evidence only reluctantly in extreme cases.<sup>347</sup> If there had been any evidence that the Sorensons' shared intention had been to return to the United States, under either the *Feder* or *Mozes* standard, the district court would likely have found E. S. S.'s habitual residence to be America.<sup>348</sup> Regardless of how definitive the objective evidence may seem, a conclusion that the parents' shared intent was for the family's habitual residence to remain the United States or that the parents in fact lacked a shared intent would have rendered the objective facts irrelevant, unless, of course, it was "unequivocal" in the court's eyes.<sup>349</sup>

#### B. *Why Courts Should Follow the Robert Standard*

This Note's application of the *Feder* and *Mozes* standards to the facts of *Sorenson* shows the confusion and uncertainty that result when shared subjective intent is incorporated into the habitual residence analysis.<sup>350</sup> Such an analysis allows courts to revert to considerations akin to the "best interests" inquiry of traditional child custody proceedings and results in illogical determinations of habitual residence. Given the very specific goals of the Child Abduction Convention's drafters and the discussions that surrounded the convention's drafting, this Note advocates adherence to a standard that considers only objective evidence of settled purpose and acclimatization when determining a child's habitual residence. Despite the best efforts of the Third and Ninth Circuits and common-law courts to make habitual residence determinations in accordance with the spirit of the Child Abduction Convention, their reliance on subjective intentions as a decisive factor has a number of fatal flaws.

Although all the circuits agree that there must be evidence of a degree of settled purpose in order for a country to be deemed a child's habitual

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346. See *supra* notes 173–79 and accompanying text.

347. See *supra* notes 190, 195–98, 204–09 and accompanying text.

348. See *supra* Part II.A.

349. See *supra* notes 202–09 and accompanying text. Since the Sorensons had kept a few vestiges of their previous life with family in Minnesota and maintained a joint Minnesota bank account, a court following *Mozes v. Mozes* would be highly unwilling to find the remainder of the objective evidence "unequivocal."

350. See *supra* Part III.A; see also *supra* text accompanying notes 216–23 (describing how the Eight Circuit, applying the same *Mozes* standard, disagreed on Sam and Jacob's habitual residence).



residence,<sup>351</sup> the resulting divergence in standards originates in a difference in opinion as to what constitutes “settled purpose.” For the Third Circuit, there can be no settled purpose without evidence of a shared parental intent to acquire a new habitual residence.<sup>352</sup> The Ninth Circuit goes so far as to require a showing of shared parental intent to both abandon an old habitual residence and to acquire new habitual residence, transforming evidence of settled purpose into an evidence akin to a showing of domicile.<sup>353</sup> The Sixth Circuit has articulated the most restrained interpretation of settled purpose, looking solely to objective evidence of acclimatization to show that sufficient continuity in residences exists to be deemed settled.<sup>354</sup>

Focusing on shared parental intent is problematic given that the very nature of Child Abduction Convention proceedings presumes that the parents disagree as to where their child’s habitual residence ought to be.<sup>355</sup> It is axiomatic that, by the time a Child Abduction Convention proceeding is started, there is no shared parental intent as to where a child should be habitually resident. Thus, a standard such as that articulated in *Mozes*, which emphasizes subjective intentions, encourages courts to engage in a messy, two-step determination of (1) a hypothetical time in the recent past when a shared intent between the parents existed and (2) what, in fact, that intent was.<sup>356</sup> Such an inquiry into difficult-to-divine and amorphous concepts is directly contrary to the summary-return mechanism contemplated by the Child Abduction Convention’s drafters.

Focusing on objective factors avoids contravention of the Child Abduction Convention’s drafters’ goals. First and perhaps foremost, the drafters never intended Child Abduction Convention proceedings to be custody proceedings.<sup>357</sup> Rather, Child Abduction Convention proceedings were intended to be administrative proceedings, and the merits of the case were to be left to those better suited to determine the child’s custody.<sup>358</sup> The Third and Ninth Circuits’ consideration of the parents’ shared subjective intent is motivated by a belief that children are easily manipulated and that parents are best suited to provide evidence as to a child’s habitual residence.<sup>359</sup> This, in essence, forces upon the Child Abduction Convention an analysis eerily similar to the best-interests standard that the drafters made a concerted effort to avoid.<sup>360</sup> In contrast,

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351. See *supra* notes 172–73, 267 and accompanying text.

352. See *supra* note 174 and accompanying text.

353. See *supra* notes 104–05, 191–94 and accompanying text.

354. See *supra* notes 260, 267 and accompanying text.

355. This is a difficulty that even the Ninth Circuit recognized in *Mozes*. See *supra* text accompanying note 199.

356. See *supra* notes 200–01 and accompanying text.

357. See *supra* note 78 and accompanying text; see also *Report of the Special Commission*, *supra* note 72, at 178 (“[The Child Abduction Convention] does not settle, or seek to settle, the question of custodial rights.”).

358. See *supra* notes 81–84 and accompanying text.

359. See *supra* notes 197–98, 207 and accompanying text.

360. See *supra* notes 53–56, 61, 77–86 and accompanying text; see also *Report of the Special Commission*, *supra* note 72, at 182–83.

the *Robert* standard remains faithful to the drafters' goals of simplicity and expediency that underlay their decision to make the Child Abduction Convention a noncustodial proceeding.<sup>361</sup>

In addition, the drafters desired uniformity in interpretation and application of the Child Abduction Convention.<sup>362</sup> Clearly, the existing conflict precludes the attainment of uniform interpretation, however, this Note declines to advocate adherence to the *Feder* and *Mozes* standards for the mere sake of conformity. Consideration of subjective intentions encourages parents to forum shop for the court most willing to entertain narratives of either hesitation in moving or the settled nature of the family's life in a new country.<sup>363</sup> The drafters, in establishing a new mechanism for handling international child abductions, deliberately sought to avoid such exploitation of children.<sup>364</sup> To avoid weakening the Child Abduction Convention, courts in the United States and worldwide should refrain from focusing on parents' shared subjective intents.<sup>365</sup>

Interwoven with the Child Abduction Convention's drafters' goal of uniformity is their goal of maintaining flexibility in the habitual residence determination.<sup>366</sup> While upon first glance it would seem that any standard to incorporate subjective intentions would be inherently more flexible, nothing could be farther from the truth. When the Child Abduction Convention drafters first contemplated a uniform mechanism for dealing with international child abductions, they were responding to the rampant inconsistencies that resulted from each country's different method for resolving such cases.<sup>367</sup> The creation of a single overarching rule was designed to eliminate each court's rigid adherence to its preferred method of analysis, as well as the influence of national biases.<sup>368</sup> Thus, the drafters were not concerned with flexibility in individual cases, but rather flexibility in the overall application of the convention.

Settled purpose and, by extension, habitual residence does not require proof of shared subjective intent, but rather objective evidence of acclimatization that shows that a child has the type of attachments and relationships to a country that would require restoration of the status quo.<sup>369</sup> From the child's perspective, this can be shown through evidence of the

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361. See *supra* notes 53–56, 61, 77–86 and accompanying text (describing the pitfalls of the best-interests standard).

362. See *supra* notes 87–90 and accompanying text.

363. See *supra* notes 86, 265 and accompanying text.

364. See *supra* note 86 and accompanying text.

365. See Weiner, *supra* note 214, at 279 (noting that lack of uniform interpretation might weaken the Convention); see also *supra* note 89 and accompanying text.

366. See *supra* notes 111–12 and accompanying text.

367. See *supra* notes 53–57 and accompanying text.

368. See *supra* notes 61, 80–81 and accompanying text.

369. See Dyer Report, *supra* note 44, at 21 (describing how children suffer from the “sudden upsetting of [their] stability, the traumatic loss of contact with the parent who has been in charge of [their] upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives”); see also *supra* note 84 and accompanying text.

child's enrollment in school, the primary language spoken by the child, the quality and duration of the child's stay in a particular country, and the relationships formed by the child with friends and relatives.<sup>370</sup> Where there is insufficient objective evidence of settled purpose from the child's perspective, the court may then turn to objective evidence of settled purpose from the parents' perspective, such as permanence of occupation.<sup>371</sup> The *Robert* standard's focus on objective factors best embodies the drafters' understanding of habitual residence as a "purely factual concept, to be differentiated especially from that of the 'domicile'"<sup>372</sup> and best maintains the flexibility the Child Abduction Convention's drafters envisioned.<sup>373</sup>

### CONCLUSION

In the decades since the Child Abduction Convention was adopted in 1980, courts worldwide have struggled with the issue of habitual residence. As a result, a conflict has developed over whether courts should consider only objective facts or include subjective intentions in the habitual residence determination. Courts in the United States and worldwide must apply the standard that best achieves the objectives of the Child Abduction Convention's drafters. When the drafters met in the late 1970s to face the growing problem of international child abductions, they were clear in their goal of protecting children from the effects of wrongful removals and retentions.<sup>374</sup> Yet, they were equally adamant in their desire to construct a text that would provide certainty, consistency, and expediency for all parties involved, while at the same time maintaining a high degree of flexibility.<sup>375</sup> Courts such as the Third and Ninth Circuits have lost sight of the drafters' intent. Any analysis that focuses on the shared subjective intentions of parents is not only illogical, but rigid, inconsistent, and wrought with uncertainty. Where a court is presented with a Child Abduction Convention proceeding, it must act with restraint, focusing only on the objective evidence, and avoid reverting to more comfortable concepts, such as best interests. Only then will the Child Abduction Convention's procedures be uniformly applied and its objectives universally accomplished.<sup>376</sup>

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370. See, e.g., *supra* notes 268–71, 316, 325–26, 332–33 and accompanying text.

371. This may be the case where the child is too young to enroll in school or show evidence of relationships, where there is insufficient evidence to show definitively that one country is the child's habitual residence over another (the evidence "cuts both ways"), or where the court feels strongly that the child's attachments have been manipulated by the abducting parent. See, e.g., *supra* notes 18–19 and accompanying text.

372. *Report of the Special Commission*, *supra* note 72, at 189.

373. See *supra* notes 102–14 and accompanying text.

374. See *supra* notes 68–76 and accompanying text.

375. See *supra* notes 77–85, 103–12 and accompanying text.

376. See *supra* note 128.

APPENDIX<sup>377</sup>

Case Name; Citation	Facts of Retention/ Removal	Court's Holding	Shared Parental Intention	Evidence of Child's Acclimatization	Evidence of Parents' Acclimatization
Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993)	Removal of 2-year-old son by mother from Germany to the United States	Habitually resident in Germany; removal wrongful	N/A	Born in Germany; lived exclusively in Germany until removal (almost 2 years)	N/A
Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995)	Removal of 4-year-old son by mother from Australia to the United States	Habitually resident in Australia; removal wrongful	Shared intention to move to and remain in Australia indefinitely	Born in Germany; lived in the United States for 3 ½ years; lived in Australia for 6 months (until removal); attended an Australian nursery school; was enrolled in kindergarten	Mrs. Feder accepted a role in the Australian Opera Company; Mr. Feder obtained an Australian license; both completed paperwork for permanent residency; bought and renovated a home; made arrangements for long-term schooling
Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001)	Retention of a 9-year-old and 5-year-old twins by mother in the United States	Habitually resident in Israel at time of move; remanded for determination of whether the United States supplanted Israel as habitual residence	No shared intention to abandon Israel in favor of the United States	Born in Israel; lived in Israel for the majority of their lives; lived in the United States for about 1 year; enrolled and participated in school full-time and in social, cultural, and religious activities; learned English	N/A

377. Many thanks to Professor Thomas Lee for suggesting the use of a table to summarize concisely the facts of the cases discussed in this Note.

Case Name; Citation	Facts of Retention/ Removal	Court's Holding	Shared Parental Intention	Evidence of Child's Acclimatization	Evidence of Parents' Acclimatization
Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003)	Removal of 8-year-old and 5-year-old sons by mother from Israel to the United States	Habitually resident in Israel; removal wrongful	Shared intention to move to Israel permanently	Born in the United States; lived in the United States for 7 and 4 years, respectively; lived in Israel for about 1 year; enrolled in elementary school and preschool; participated in extracurriculars; learned Hebrew	Sold U.S. home; moved all possessions and the family's pets to Israel; mother made Aliyah (immigration) to Israel in 1987; father made Aliyah just prior to the family's move
Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004)	Removal of 11-year-old and 5-year-old sons by mother from Mexico to the United States	Habitually resident in the United States; removal not wrongful	No shared intention to abandon the United States in favor of Mexico	Born in the United States; lived in the United States for 7 and 2 ½ years, respectively; lived in Mexico for about 3 years; went to school; had social engagements	House was being built for the family in Mexico; no belongings were left in the United States
Gitter v. Gitter, 396 F.3d 124 (2d Cir. 2005)	Removal of 2-year-old son by mother from Israel to the United States	Habitually resident in the United States at time of move; remanded for determination of whether Israel supplanted the United States as habitual residence	No shared intention to abandon the United States in favor of Israel	Born in the United States; lived in the United States for 3 months; lived in Israel for nearly 2 years	U.S. bank accounts closed; cars sold; belongings put in storage (then sold or given away); son enrolled in day care
Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007)	Retention of 6-year-old twins by mother in the United States	Habitually resident in the United States; retention not wrongful	N/A	Born in the United States; lived in the United States a total of 4 ½ years; lived in France a total of less than 2 years; formed meaningful relationships with maternal relatives while in the United States, had scant contact with paternal relatives; French home unfit to live in	N/A

Case Name; Citation	Facts of Retention/ Removal	Court's Holding	Shared Parental Intention	Evidence of Child's Acclimatization	Evidence of Parents' Acclimatization
Sorenson v. Sorenson, 563 F. Supp. 2d 961 (D. Minn. 2008)	Retention of 4-year-old daughter by mother in Australia	Habitually resident in Australia; retention not wrongful	Shared intention to move to and remain in Australia indefinitely	Born in the United States; lived in the United States for 14 months; lived in Australia for nearly 3 years; enrolled in an Australian preschool; spoke with an Australian accent; friends were in Australia	U.S. house and cars sold; personal belongings transported to Australia; Minnesota residency surrendered and Australia claimed as residence for tax purposes
<i>In re Bates</i> , (1989) CA 122/89, slip op. (High Ct. of Justice, Fam. Div., Royal Cts. of Justice) (U.K.)	Removal of 2 ½-year-old daughter by nanny (on behalf of father) from the United States to England	Habitually resident in the United States; removal wrongful	Shared intention to remain in the United States for the duration of father's tour	Lived around the world with her parents because of father's job	Arrangements made for care and accommodations in N.Y.; arrangements made for speech therapy sessions in N.Y.
Dickson v. Dickson [1990] Sc. L.R. 692 (Sess.) (Scot.)	Removal of infant son by father from Australia to the United Kingdom	Habitually resident in the United Kingdom; removal not wrongful	Shared intention that father and son would leave Australia for the United Kingdom	Born in Scotland and lived there for about 1 year; lived in Australia for about 6 months; lived in England for about 2 months before petition was filed	N/A
Cooper v. Casey, (1995) 18 Fam. L.R. 433 (Austl.)	Removal of 5-year-old and 2-year-old sons by mother from the United States to Australia	Habitually resident in the United States; removal wrongful	Shared intention to make the United States the children's permanent home	Born in Australia; lived in the United States for a total of more than 2 years; lived in Australia for a total of about 1 year; neither child had been to Australia for nearly 2 years; 5-year-old attended preschool in the United States	N/A

Case Name; Citation	Facts of Retention/ Removal	Court's Holding	Shared Parental Intention	Evidence of Child's Acclimatization	Evidence of Parents' Acclimatization
Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Justice], 14/6/1995, "Wilner, Eduardo Mario v. Osswald, María Gabriela / recurso de hecho," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1995-318-1269) (Arg.)	Removal of 4-year-old daughter by mother from Canada to Argentina	Habitually resident in Canada; removal wrongful	N/A	Born in Canada; lived exclusively in Canada until removal; attended Canadian kindergarten; formed "bonds of affection" with people, places, & things	N/A
Johnson v. Johnson; Regeringsrätten [RegR] [Supreme Administrative Court] 1996-05-09 (Swed.)	Retention of 6-year-old daughter by mother in Sweden	Habitually resident in Sweden; retention not wrongful	N/A	Born in Switzerland and lived there for about 2 years; lived in the United States for 2 years alternating between mother in N.Y. and father in Washington, D.C.; lived in Sweden for more than 2 years preceding petition; by agreement was to spend total of 8 years in Sweden and 4 years in the United States before turning 18	N/A
Rochford v. Rochford, Juvenile Court of Rome, 07 jan. 1999, n.2450/98 E (Italy)	Removal of 5-year-old son by mother from England to Italy	Habitually resident in England; removal wrongful	N/A	Born in England; lived exclusively in England until removal; spoke only English (no Italian)	N/A

## *Notes & Observations*